RECORD, CASE No. 14,843.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 1369.

THE NATIONAL EXCHANGE BANK OF BALTIMORE, MARYLAND, APPELLANT,

vs.

W. H. PETERS, RECEIVER OF THE EXCHANGE NATIONAL BANK OF NORFOLK, VIRGINIA; R. H. McDONALD, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED SEPTEMBER 17, 1891.

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1 In the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk.

Be it remembered that heretofore, to wit, in the clerk's office of the said United States circuit court, on the 5th day of May, A. D. 1890, came W. H. Peters, receiver of the Exchange National Bank of Norfolk; R. H. McDonald, John B. Whitehead, and C. E. Jenkins, defendants, and filed their certain record and the proceedings of the circuit court for the city of Norfolk, Virginia, in the words and figures following, to wit:

2 VIRGINIA:

In the Clerk's Office of the Circuit Court of the City of Norfolk, on the — Day of April, 1890.

Be it remembered that heretofore, to wit, in the clerk's office of the said circuit court, on the 31st day of March, 1890, came The National Exchange Bank of Baltimore, Maryland, plaintiff, and filed its certain memorandum in the words and figures following, to wit:

Circuit Court for the City of Norfolk.

THE NATIONAL EXCHANGE BANK OF BALTIMORE, MARYLAND,
against
W. H. PETERS, Receiver of the Exchange National Bank of Norfolk; R. H. McDonald, John B. Whitehead, C. E. Jenkins, R. T. K. Bain, George M. Bain, Jr., James G. Bain, and Orlando Windsor. } In Chancery.

Rules first Monday in April, 1890.

G. M. DILLARD, *p. q.*

And endorsed the said memorandum as follows:

And the proper affidavit having been made, the clerk is required to endorse on the summons an order to the sergeant of the city to attach the following property of the defendant R. H. McDonald, to wit:

1st. That lot of land now lying in Norfolk city designated as lot "B" on a plat and survey of "Tomoko" made by J. F. Dezendorf, surveyor, and filed with the papers in the suit of Webb *vs.* Webb and recorded in Norfolk county, said lot being situated on
3 Central avenue and Edmunds' creek (also called Tarrant creek), and was conveyed to said McDonald by A. S. Martin and wife by deed of Feb'y 27th, 1882, which is recorded in Norfolk county.

2nd. That lot of land marked "C" on said plat and bounded by lot "B," North avenue, Edmunds' creek, and River street, and was

conveyed to said McDonald by Henry Finck and wife; deed recorded as above.

3rd. That certain tract of land near Atlantic City, now included in the city of Norfolk, said to contain about fifty-six acres, bounded on the north by the road known as the Tanner's creek or Armistead's road, on the east by Colley's creek (sometimes called Washington creek), on the south by the land of F. M. Peed and by Colley's creek, and on the west by Colley avenue, which was conveyed to said McDonald by John B. Whitehead and wife, W. W. Old, trustee, and G. H. Boyd and wife, which conveyances are recorded in Norfolk county.

NATIONAL EXCHANGE BANK
OF BALTIMORE,
By G. M. DILLARD, *Its Counsel.*

At the same time the said plaintiff made and filed the following affidavit:

In the Circuit Court of the City of Norfolk.

THE NATIONAL EXCHANGE BANK OF BALTIMORE, Plaintiff, *against* R. H. McDONALD *et als.*, Defendants. } In Chancery.

G. M. Dillard, attorney for the plaintiff, maketh oath and
4 saith that he believes the claim for which the above action is instituted to be just; that he believes that the plaintiff is entitled to and ought to recover in said action $6,697.72 at the least, past due and payable, with interest thereon to be computed at the rate of 6 per centum per annum from the 1st day of April, A. D. 1885, till paid, and that to the best of his belief the said defendant, R. H. McDonald, is not a resident of this State and has estate or debts owing to said defendant in the city of Norfolk, in which the action is.

G. M. DILLARD.

Subscribed and sworn to before me this 31st day of March, A. D. 1890.

W. A. YOUNG, *C. C.*

And thereupon the said plaintiff sued out of said office a summons in the words and figures following:

Commonwealth of Virginia to the sergeant of the city of Norfolk, Greeting:

We command you that you summon W. H. Peters, receiver of the Exchange National Bank of Norfolk; R. H. McDonald, John B. Whitehead, C. E. Jenkins, R. T. K. Bain, George M. Bain, Jr., James G. Bain, and Orlando Windsor to appear at the clerk's office of our circuit court of the city of Norfolk, at the rules to be holden for the said court on the first Monday in April, 1890, to answer a bill in

chancery exhibited against them by the National Exchange Bank of Baltimore, Maryland.

And have then and there this writ.

5 Witness W. A. Young, clerk of our said court, at his office, this 31st day of March, 1890, in the 114th year of our foundation.

W. A. YOUNG, *Clerk*,
By LAW. L. WARING, *D. C.*

Endorsed.

The officer to whom this summons is addressed is directed to attach—

1st. That lot of land now lying in the city of Norfolk designated as lot B on a plat and survey of "Tomoko" made by John F. Dezendorf, surveyor, and filed with the papers in the suit of Webb vs. Webb and recorded in Norfolk county, said lot being situated on "Central avenue" and Edmunds' creek (sometimes called Tarant creek), and was conveyed to said McDonald by A. S. Martin and wife by deed of February 27th, 1882, which is of record in Norfolk county.

2nd. That lot of land marked "C" on said plat and bounded by lot B, North avenue, Edmunds' creek, and River street, and was conveyed to said McDonald by Henry Finck and wife, recorded as above.

3rd. That certain tract of land near Atlantic City, now included in the city of Norfolk, said to contain about fifty-six acres, bounded on the north by the road known as Tanner's creek or Armistead's road, on the east by Colley's creek (sometimes called Washington creek), on the south by the land of F. M. Peed and Colley creek, and on the west by Colley avenue, which was conveyed to said McDonald by John B. Whitehead and wife, W. W. Old, trustee, and G. H. Boyd and wife (which conveyances are recorded in Norfolk county), the property of the defendant R. H. McDonald, and also any other

6 estate of the said R. H. McDonald, whether in his own hands or in the hands of any other defendants.

Teste: LAW. L. WARING, *D. C.*,
For W. A. YOUNG, *C. C.*

Which said summons was returned with the following endorsement thereon:

Executed this 2nd day of April, A. D. 1890, by serving copies hereof, without the attachment endorsed thereon, on W. H. Peters, receiver of the Exchange National Bank of Norfolk; John B. Whitehead, and C. E. Jenkins, and on the 3rd day of April, 1890, I served a copy hereof, with like attachment thereon endorsed, on R. T. Jordan, being in possession of the property levied on.

C. L. QUINN, *Deputy*,
For J. A. BRIMMER, JR., *Sergeant.*

Levied on the following real estate of the defendant R. H. McDonald, to wit:

1st. That lot of land now lying in Norfolk city designated as lot "B" on a plat and survey of "Tomoko" made by J. F. Dezendorf, surveyor, and filed with the papers in the suit of Webb *vs.* Webb and recorded in Norfolk county, said lot being situated on "Central avenue" and "Edmunds' creek" (sometimes called "Tarant creek"), and was conveyed to said McDonald by A. S. Martin and wife by deed of Feb'y 27th, 1882, which is of record in Norfolk county.

2nd. That lot of land marked "C" on said plat and bounded by lot "B," North avenue, Edmunds' creek, and River street, and was conveyed to said McDonald by Henry Finck and wife, recorded as above.

7 3rd. That certain tract of land near Atlantic City, now included in the city of Norfolk, said to contain about fifty-six acres, bounded on the north by the road known as Tanner's creek or Armistead road, on the east by Colley creek (sometimes called "Washington creek"), on the south by land of F. M. Peed and Colley's creek, and on the west by Colley avenue, which was conveyed to said McDonald by John B. Whitehead and wife, W. W. Old, trustee, and G. H. Boyd and wife (which conveyances are recorded in Norfolk county), this the 31st day of March, in the year 1890, at 3.30 o'clock p. m.

JOHN A. BRIMMER, JR., *Serg't*,
By FRANK R. HENRY, *Deputy*.

And on the same day, to wit, on the 31st day of March, 1890, the plaintiff filed its bill herein in the following words and figures:

8 To the Honorable C. W. Hill, judge of the circuit court for Norfolk city, Virginia:

Your complainant, The National Exchange Bank of Baltimore, in the State of Maryland, a corporation duly created and organized under and doing business in compliance with the laws of the United States, who sues for itself and all other creditors occupying the same position, if any there are, who shall join in this suit and contribute to its costs, humbly complaining, showeth unto your honor—

That for ma-y years prior to and until the 2nd day of April, in the year 1885, the Exchange National Bank of Norfolk, in the State of Virginia, was a corporation duly created, organized, and doing business according to the laws of the United States, with a capital stock paid in of $300,000, with the following persons acting as and being its officers and directors, to wit:

John B. Whitehead, president; James G. Bain, vice-president, and Geo. M. Bain, Jr., cashier, and R. T. K. Bain and said James G. Bain, of Portsmouth, Virginia, said John B. Whitehead, Orlando Windsor, and C. E. Jenkins, of Norfolk, Virginia, and R. H. McDonald, of San Francisco, in the State of California, were its directors and had been for many years.

That the said Exchange National bank, through its solicitations and the confidence reposed in its officers and directors aforesaid, had succeeded in obtaining and conducting a very large general banking business, consisting of discounts, deposits, exchange, collections, &c.

That in this way it had obtained of your complainant, according to the usage and custom of bankers, a large account of checks, bills, notes, and other items for collection, deposit, and remittance, and the said bank undertook and agreed, in consideration of similar services rendered it by your complainant, the usage and custom of bankers, the confidence reposed in it, and the use and benefit derived by it from the deposits so collected, to faithfully keep said account and collect all such items that might be delivered to it by your complainant against persons in Norfolk and its vicinity, and to regularly, to wit, on the 1st and 10th and 20eth of each month, settle said account and pay over to your complainant all that should on each of those dates be due your complainant.

9

That under this undertaking and agreement your complainant, for several years prior to and until the 2nd day of April, in the year 1885, transmitted and delivered to the said Exchange National bank very large sums to collect, amounting to many thousand dollars monthly, and the last settlement which it made with your complainant was on the 20eth of March, in the year 1885, between which date and the said 2nd day of April your complainant transmitted and delivered to the said bank as aforesaid checks, bills, notes, and other items equivalent to cash amounting to the large sum of $14,883.87, which said bank collected and for which it gave in part certain drafts (see account filed herewith, marked "Exhibit A," and to be taken as part of this bill), but owing to its failure and suspension, for the causes hereinafter mentioned, on the said 2nd day of April, in the year 1885, did not pay and has not yet paid to your complainant the said sum or any part thereof, except such dividends as have been paid thereon by its receiver See also Exhibit "A."

10

That shortly after said failure and suspension said bank was duly placed in the hands of W. H. Peters, receiver, and your complainant charges that the causes which led to said failure and suspension and the loss which your complainant has in consequence thereof sustained are as follows:

That the said directors did not give that care, supervision, and attention to the affairs of the said bank which the duties of their office and the nature of the trust reposed in them required, but, on the contrary, neglected the same and entrusted the entire business concerns of the bank to John B. Whitehead, one of the directors and the president of the bank, and George M. Bain, Jr., its cashier, who recklessly and improvidently loaned the money and securities of the bank to various embarrassed and insolvent firms and individuals, notably to the firm of Bain & Bro., of Portsmouth, Virginia, without taking proper and sufficient securities for the protection of creditors and others, confiding in the directors' management of the said bank, and recklessly converted the money of the bank to their own use, the said Whitehead and Bain carrying a joint account at said bank, which at the time of its failure was overdrawn in the enormous sum of over sixty thousand dollars.

In order more specifically to point out the gross negligence and mismanagement of said bank by said directors and officers your

complainant proceeds to set forth and charge the following facts and circumstances, to wit:

11 That George M. Bain, Jr., cashier and one of the persons to whom the directors especially intrusted the affairs of the said bank, was, together with his brothers, R. T. K. Bain and James G. Bain, two of the directors aforesaid, a member of the firm of Bain & Brother, brokers and bankers, doing business in Portsmouth, Virginia.

That that firm was utterly insolvent and had been so for many years, and it closed it- doors and suspended its business on the same day that the said Exchange National bank did.

That notwithstanding said firm's insolvency, which many of the directors well knew and which, if unknown to any of them, was through their flagrant carelessness in conducting the affairs of the said bank, the said firm was given almost unlimited access to the moneys and resources of said bank, and that on or about March 30th, in the year 1885, the said bank held the notes of the said firm signed by them on which they had obtained the money of the bank to the enormous amount of about $625,000, for which no security was held or had been taken.

That, in addition to those notes made by Bain & Bro., they had indorsed and rediscounted at the said Exchange National bank certain notes made by George M. Bain, Jr., Wallace & Son, and other persons amounting to about $582,000, for which the bank neither took nor held any security.

That prior to and on the date of the failure of said bank Geo. M. Bain, Jr., and John B. Whitehead aforesaid, the trusted managers of the bank, were indebted to it on their joint account

12 in the following amounts, to wit: Their one note for $1,346.51, due December 29, in the year 1884; their one note for $31,200, due July 11, in the year 1885; their one note for $11,500, due July 15, in the same year; their one note for $79,550, due on demand; also their overdraft on joint account amounting to $60,569.47 and a due bill for $10.23, making the total sum of $184,176.21 which these two officers had appropriated of the bank's money.

That at the same time said Geo. M. Bain, Jr., was further indebted to said bank for money which he had advanced to himself on his individual account out of the funds of the bank to the extent of $36,860, and was liable to said bank as indorser on notes to the amount of $34,738.73, as follows: One note for $28,598.73, due August 6, 1885; one note of G. A. G. Scott, for $140, one note of S. S. Nottingham for $3,000, and a note of James G. Bain for $3,000.

That George T. Wallace and J. G. Wallace, comprising the firm of Wallace & Son and conducting a business in connection with Bain & Brother as their special insolvent partners, were indebted to said bank at the date of its failure in the several sums following, to wit: Five notes for $16,000 each, all indorsed by Bain & Bro.; two notes made by George T. Wallace, indorsed by J. G. Wallace—one for $10,000, and the other for $15,000, which sums were taken from the bank without security.

That on or about the 18th day of March, in the year 1885, George M. Bain, Jr., cashier, and John B. Whitehead, Orlando Windsor, and C. E. Jenkins, directors aforesaid, carelessly and negligently made and published a report to the Comptroller of the Cur-
13 rency of the condition of affairs of said bank on the 10th of March in that year, in which they carelessly and negligently stated that the said bank's loans and discounts on paper, with two or more individual or firm names, amounted to the sum of $1,752,214.79, when in fact said loans and discounts amounted to only $872,053.72; that the amount of loans and discounts on single named paper, without other security, amounted to $5,241.16, when in fact they amounted to $968,311.89; that other stock, bonds, &c., amounted to $351,620.33, when in fact they amounted to only $271,620.38; that all other loans amounted to $626,752.44, when in fact they amounted to only $543,842.78; that the liabilities of directors of the bank were $209.398.18, when in fact they amounted then to $1,194,608.32; that the individual deposits at said bank subject to check amounted to $2,422,621.95, when in fact they amounted to $2,642,054.24; that — on overdrafts were reported, when in fact the overdrafts which said bank had paid then amounted to $219,432.29; that the resources of the bank in bills of other banks amounted to $15,500, when in fact they then amounted to only $11,693.15; that the highest rate of interest paid by said bank was 6 per cent., when in fact it was then paying 7 per cent. or more, and in many other respects said report was careless and negligent and calculated to deceive the Comptroller and other persons and to prolong the existence of said bank and obtain further deposits of moneys and securities which it had, and, among others, the moneys and securities of your
14 complainant as aforesaid, which resulted in the loss complained of.

That the examiners, James C. Brown and B. U. Keyser, who had been placed in charge of the books of said bank after its suspension and directed to report its condition to the Comptroller, on the 9th of April, 1885, reported as follows:

That the excessive loans of the bank amounted to "Bain & Bro., worthless, $325,000;" "Bain & Bro., irregularly rediscounted, worthless, $50,000," and specifying other loans under the head of "excessive," amounting in all to over $1,800,000; that these loans greatly exceeded the limit prescribed by law; that "we find on the individual ledgers overdrafts amounting to the enormous sum of $150,214.54. One of these, namely, on the account of John B. Whitehead and George M. Bain, Jr., who were president and cashier of this bank respectively, is $60,569.47."

In the liability of directors, as here reported, John B. Whitehead is shown to have owed the bank as payer at the time of its failure $187,496.

Then follows this language in said report: "It was the custom of these directors to meet only to organize and declare dividends. It is apparent that the directors were mere figure-heads, and by their neglect of their duty were false to their oaths of office, false to the interests of the shareholders, whose representatives they were, and

false to the interests of the depositors whose money they had in custody."

And your complainant reiterates each of these statements and charges that the same are true and that the various misappropriations and wrongful acts mentioned occurred during the
15 management of the affairs of said bank by the said officers and directors.

And your complainant further charges that on or about the 15th of March, in the year 1885, in consequence of an examination having been made by a regular bank examiner, in complyance with his duty, according to law, into the affairs of said bank, and of his requiring in consequence thereof that the securities of said bank should be increased, or that it should otherwise suspend and be closed, in consequence of notice sent him to that effect, the said R. H. McDonald arrived in Norfolk and attended the meeting of the said officers and directors of said bank, and they were all fully apprised of its hopelessly insolvent and ruined condition; notwithstanding all which they, the officers and directors of said bank, wholly and intentionally concealed from your complainant the cause of this suit and all of its features, which from the circumstances of the case they were enabled to do till said 2nd day of April, in the year 1885, and permitted said bank to continue to receive your complainant's securities and money as aforesaid, well knowing that the same would not be paid to your complainant, but would be lost in the affairs and insolvency of said bank.

Your complainant has waited in hope that the said loss which it has sustained would be repaired through the payments made by said receiver or that its loss would be otherwise satisfied, but now that the statute of limitations is about to apply in bar of your complainant's remedy against said directors, your complainant
16 has no other resource but to institute this suit in equity, where this matter is properly cognizable, without which your complainant would be remidiless.

And your complainant therefore prays that the said Exchange National Bank, through W. H. Peters, its receiver; John B. Whitehead, Orlando Windsor, R. H. McDonald, C. E. Jenkins, James G. Bain, R. T. K. Bain, and George M. Bain shall be made defendants to this bill, and that the said defendants shall be required to severally answer the allegations and charges herein contained fully and specifically as if they were each thereunto specifically interrogated and as if the allegations were here repeated to them, and that each defendant shall particularly answer all statements and charges of matters respecting himself or lying within his knowledge or recollection, and that said R. H. McDonald shall state whether he was or was not informed of the failing condition of said bank before he came to Norfolk in 1885 aforesaid and when he was so informed and when he arrived in Norfolk in the spring of that year and when he met his said codirectors of said bank and consulted with them as aforesaid and why he came and met them at that time and whether he was then requested to advance a large sum of money to save said bank from ruin, and that they shall each answer said

allegations and charges as aforesaid, not only according to their positive knowledge, but according to their information and belief, but an answer under oath is waived by your complainant as to each of the said defendants.

Your complainant further prays that the matters herein
17 contained may be referred to a commissioner of this court to ascertain the truth of the statements and charges herein made and the liability of the defendants severally to make good the loss complained of, and to ascertain and report all other matters pertinent to this case which your complainant has not had the means of ascertaining.

And your complainant prays for an adequate counsel's fee, in accordance with the nature of the case and the practice in courts of equity, and that process of this court may issue compelling the defendants The Exchange National Bank, through its receiver, W. H. Peters; R. H. McDonald, John B. Whitehead, C. E. Jenkins, Orlando Windsor, James G. Bain, R. T. K. Bain, and George M. Bain, Jr., to appear and answer this bill.

And yo-r complainant prays for all other and further relief such as may be adapted to the nature of this case and which may be agreeable to equity and good conscience; and will ever pray.

NATIONAL EXCHANGE BANK
OF BALTIMORE, MD.,
By G. M. DILLARD, *Counsel.*

The following is Exhibit "A" filed with the foregoing bill:

STATE OF MARYLAND, } *To wit:*
City of Baltimore, }

Be it remembered, and it is hereby certified, that on this 22nd day of March, A. D. 1890, before me, J. Kemp Bartlett, Jr., a commissioner of the State of Virginia, residing in the city of
18 Baltimore, State of Maryland, duly commissioned by the executive authority and under the laws of the State of Virginia, and authorized to administer oaths and affirmations and to take the acknowledgement of deeds and other instruments of writing to be used and recorded therein, personally appeared Wm. T. Dixon and Job Scott, respectively the president and cashier of the National Exchange Bank of Baltimore, Maryland; that they, the said president and cashier, respectively made affirmation and oath that they were — at the time of the accruing of the indebtedness set forth in the annexed account; that they have examined the annexed account of the National Exchange Bank of Baltimore, Maryland, against the Exchange National Bank of Norfolk, Virginia, and compared the same with the books of original entry of the said National Exchange Bank of Baltimore, Maryland; and said affiants further make affirmation and oath respectively that the annexed account is just and true, and that there is now due the said National Exchange Bank of Baltimore, Maryland, the sum of $6,697.72, with interest on the whole account as made out, and that no pay-

ment has been received on account of the original indebtedness except as shown in said annexed account.

WM. T. DIXON.
JOB SCOTT.

Affirmed and sworn to and subscribed before me this 22nd day of March, 1890, as witness my hand and official seal, at Baltimore aforesaid.

[SEAL.] J. KEMP BARTLETT, JR.,
A Commissioner of the State of Virginia, Residing in Baltimore City, in the State of Md.

19 *Exchange National Bank, Norfolk, Va., in Account with the National Exchange Bank of Baltimore, Md.*

DR.			CR.
1885.			
Ap'l 4*.	To check Nat'l Park bank, New York, unpaid	7,000 00	
	Protest fees on do.	1 30	
"	* To check Hanover Nat'l bank unpaid	5,000 00	
	Protest fees on do.	1 30	
"	Am't due as per st'm't filed with W. H. Peters, receiver	2,856 21	
	Am't due as per st'm't filed with W. H. Peters, receiver	24 96	
1885.			
Oct. 1.	By div'd # 1	----	2,376 77
1886.			
M'ch 13.	" " 2	----	1,488 39
1888.			
Ap'l 27.	" " 3	----	1,488 39
May 24.	" " 4	----	744 20
Oct. 29.	" " 5	----	744 20
1890.			
Jan'y 28.	" " 6	----	744 20
	Balance	----	6,697 72
		14,883 87	14,883 87
1890.			
M'ch 22.	To balance	6,697 72	
" "	Int. to date	2,907 55	

* Original checks filed with W. H. Peters, receiver.

20 Copy.

$5,000. APRIL 1ST, 1885.

The Exchange Nat'l B'k of Norfolk, Va.

Pay to the order of Job Scott, cash'r, five thousand dollars, value received, and charge the same to account of—

(Signed) GEO. M. BAIN, JR., *Cash'r.*

To Hanover Nat'l B'k, New York.
No. 47791.

Copy.

$7,000. APRIL 1ST, 1885.

The Ex. Nat'l B'k of Norfolk, Va.

Pay to the order of Job Scott, cash'r, seven thousand dollars, value received, and charge the same to account of—

(Signed) GEO. M. BAIN, JR., *Cash'r.*

To Nat'l Park B'k, New York.
No. 81242.

21 And at another day, to wit, in the clerk's office of the said circuit court, on the 3rd day of April, came the plaintiff, by its attorney, and sued out of said office an order of publication in the following words and figures:

VIRGINIA, *City of Norfolk,* } *To wit:*

In the Clerk's Office of the Circuit Court for the said City on the 3rd Day of April, 1890.

THE NATIONAL EXCHANGE BANK OF BALTIMORE *against* R. H. MCDONALD *et als.*

In chancery and upon an attachment.

The object of this suit is to recover of the defendants, R. H. McDonald, Orlando Windsor, *et al.*, ex-directors and officers of The Exchange National Bank of Norfolk, the sum of $6,697.72, with a large amount of interest, shown by the account filed with the bill, which the plaintiff claims to have lost through the lack of care and negligence of the defendant while they were directors and officers of said bank, and also to attach the estate of the defendant R. H. McDonald, situated in the city of Norfolk, Va.

Affidavit having been made that the defendant- R. H. McDonald and Orlando Windsor are not residents of the State of Virginia, they are hereby required to appear in the said clerk's office within fifteen days after due publication hereof and do what may be necessary to protect their interest.

Teste: LAW. L. WARING, *D. C.*

G. M. DILLARD, *p. q.*

22 The following is the affidavit referred to in the foregoing affidavit, upon which the same was sued out against Orlando Windsor:

This day personally appeared G. M. Dillard and made oath that Orlando Windsor, one of the defendants in the suit of The National Exchange Bank of Baltimore *vs.* W. H. Peters, receiver, *et al.*, is not a resident of the State of Virginia.

G. M. DILLARD.

Sworn to before me this 3rd day of April, 1890.

LAW. L. WARING, *D. C.*

And at another day, to wit, at rules held for the said court on the first Monday in April, 1890, this day came the plaintiff, by counsel, and moved to dismiss this cause as to the defendants Orlando Windsor and James G. Bain.

23 And on the same day, to wit, at rules held for the said court in the clerk's office thereof on Monday, the 7th day of April, 1890, the summons issued in this cause having been returned executed on W. H. Peters, receiver of the Exchange National Bank of Norfolk; John B. Whitehead, and C. E. Jenkins, and the said W. H. Peters, receiver as aforesaid, and John B. Whitehead failing to appear, it is ordered that unless they do appear and plead, answer or demur, to the plaintiff's bill at the next rules the same will be taken for confessed as to them.

And thereupon came the defendant C. E. Jenkins and filed his demurrer in the following words and figures:

The separate demurrer of Charles E. Jenkins to a bill of complaint exhibited against him and others in chancery in the circuit court of the city of Norfolk by the National Exchange Bank of Baltimore.

The said defendant says that the said bill is not sufficient in law.

JOHN B. JENKINS, *p. d.*

At the same time came the defendant R. H. McDonald, by counsel, and filed the following plea:

In the Circuit Court of the City of Norfolk.

NATIONAL EXCHANGE BANK *vs.* R. H. McDONALD & Others. } In Equity.

24 The defendant R. H. McDonald appears for the purpose of moving to abate the attachment in this cause on the following grounds:

1. That it was issued on false suggestions.
2. That it was issued without sufficient cause.

TUNSTALL & THOM,
For R. H. McDonald.

Norfolk, Va., April 7th, 1890.

And at another day, to wit, in the clerk's office aforesaid, on the 16th day of April, 1890, came the defendant R. H. McDonald, by his attorneys, and filed the following petition:

VIRGINIA:

In the Circuit Court of the City of Norfolk, *To wit:*

THE NATIONAL EXCHANGE BANK OF BALTIMORE, Plt.,
vs.
THE EXCHANGE NATIONAL BANK OF NORFOLK, Through W. H. Peters, Receiver; John B. Whitehead, Orlando Windsor, R. H. McDonald, C. E. Jenkins, James G. Bain, R. T. K. Bain, and George M. Bain, Jr., Defendants. } In Equity.

To the Hon. C. W. Hill, judge of said court:

Your petitioner, Richard H. McDonald, of the city of San Francisco, in the State of California, respectfully represents unto this honorable court as follows, appearing specially for the purpose of filing this petition:

1st. That on the 31st day of March, in the year 1890, the said plaintiff sued out of the clerk's office of this court a summons
25 in chancery against the said defendants requiring the sergeant of the city of Norfolk to summon W. H. Peters, receiver of the Exchange National Bank of Norfolk; R. H. McDonald, John B. Whitehead, C. E. Jenkins, R. T. K. Bain, George M. Bain, James G. Bain, and Orlando Windsor to appear at the clerk's office of said court at rules, then to be holden for said court, on the first Monday in April, 1890, to answer a bill in chancery exhibited against them by the said The National Exchange Bank of Baltimore, Maryland.

2. The said bill has been filed in said clerk's office.

3. That on the 7th day of April, 1890, which was the first Monday in April, this petitioner appeared in said cause only for the purpose of moving to abate the attachment which had been sued out against certain real estate belonging to him in the said city of Norfolk, and, in making such qualified appearance, stated in writing the causes on which such motion was to be made; all of which will fully appear from a memorandum in writing filed with the record in said cause.

4. That the defendant C. E. Jenkins appeared in said cause on the 8th day of April, 1890, at the rules then being held, and filed his general demurrer to said bill.

5. That the defendant- James G. Bain and Orlando Windsor, named in said bill, departed this life prior to the 31st day of March, in the year 1890.

6. That the plaintiff is and at the time of the institution of said suit was a national bank located in the city of Baltimore, in the State of Maryland, and for jurisdictional purposes is and at
26 the time of the institution of said suit was a citizen of the State of Maryland.

7. That this petitioner is and at the time of the institution of

said suit was a citizen of the State of California, and all the other defendants that at the time of the institution of said suit were alive are and at the time of the institution of said suit were citizens of the State of Virginia.

8. That the matter in dispute in this cause exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

9. That the controversy in this suit so far as it affects your petitioner is a separate controversy and is wholly between the said plaintiff and your petitioner, and may be fully determined as between them.

10. That this cause is a suit in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arises under the Constitution or laws of the United States, to wit, title 62 of U. S. Rev. Stats., regulating national banks; all of which will appear from the bill filed herein.

11. Your petitioner files herewith a bond with good and sufficient surety, as required by the statute in such case made and provided.

Whereupon your petitioner prays that this suit may be removed into the circuit court of the United States for the eastern district of Virginia, in which district said suit is pending; and, as in duty bound, your petitioner will ever pray, &c.

RICHARD H. McDONALD,
By TUNSTALL & THOM, *His Att'ys.*

27 The following is the bond referred to in the foregoing petition:

Know all men by these presents that we, Richard H. McDonald, acting herein by his attorney-in-fact, William A. Wrenn, and the said William A. Wrenn and Alfred P. Thom, are held and firmly bound unto the National Exchange Bank of Baltimore in the sum of two hundred and fifty dollars; to the payment whereof we bind ourselves, jointly and severally, firmly by these presents, and as to this obligation or contract we and each of us waive the benefit of our homestead exemptions.

Sealed with our seals and dated this 16th day of April, in the year 1890.

The condition of the above obligation is such that whereas the said The National Exchange Bank of Baltimore has instituted a suit in equity in the circuit court of the city of Norfolk against the said R. H. McDonald and others, and the said R. H. McDonald has filed herewith a petition for the removal of the same to the circuit court of the United States for the eastern district of Virginia: Now, if the said R. H. McDonald shall enter in such circuit court of the United States on the first day of the next session thereof a copy of the record in such suit and shall pay all costs that may be awarded by the said circuit court of the United States if said last-mentioned court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

R. H. McDONALD, [SEAL.]
By WM. A. WRENN,
His Attorney-in-Fact.
WM. A. WRENN. [SEAL.]
ALFRED P. THOM. [SEAL.]

28 And on the same day, to wit, on the 16th day of April, 1890, came the defendants C. E. Jenkins and John B. Whitehead and filed their petition herein as follows:

VIRGINIA:

In the Circuit Court of the City of Norfolk.

THE NATIONAL EXCHANGE BANK OF BALTIMORE, MD., Pl't'ff,
vs.
THE EXCHANGE NATIONAL BANK OF NORFOLK, VA., Through W. H. Peters, Receiver; John B. Whitehead, Orlando Windsor, R. H. McDonald, C. E. Jenkins, James G. Bain, and George M. Bain, Jr., D'f'ts.

To the Hon. C. W. Hill, judge of the said court:

Your petitioners, C. E. Jenkins and John B. Whitehead, respectfully represent to this honorable court as follows:

1st. That they are defendants in the above-entitled suit; that the defendants Orlando Windsor and James G. Bain died before the institution of this suit, and that the defendant R. T. K. Bain is now confined in the Albany penetentiary.

2. That the matter in controversy in this cause exceeds, exclusive of interest and costs, the sum of two thousand dollars.

3. That the cause is a suit in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars and arises under the Constitution or laws of the United States, to wit, title 62 of United States Revised Statutes,
29 regulating national banks, all of which will appear from the bill filed in this cause.

Your petitioners herewith offer a bond, with good and sufficient surety, for *his* entering in the circuit court of the United States for the eastern district of Virginia, on the first day of the next session, a copy of the record in this suit and for paying all the costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed therefrom.

Wherefore they pray the court that said bond be accepted and approved; that this suit be removed for trial to the circuit court of the United States for the eastern district of Virginia, and that no further proceedings be had herein in this court.

C. E. JENKINS,
By JOHN B. JENKINS,
His Counsel.
JOHN B. WHITEHEAD,
By TUNSTALL AND THOM,
His Attorneys.

The following is the bond filed with the foregoing petition:

Know all men by these presents that we, John B. Whitehead and C. E. Jenkins, as principals, and John B. Jenkins, as surety, are held and firmly bound unto the National Exchange Bank of Balti-

more, Maryland, in the penal sum of two hundred and fifty dollars ($250), lawful money of the United States; for the payment of which we bind ourselves, jointly and severally, firmly by these presents, and we waive the benefit of our homestead exemption as to this obligation. The condition of this obligation is such that if the said John B. Whitehead and C. E. Jenkins shall enter and file or cause to be entered and filed in the next circuit court of the United States for the eastern district of Virginia on the first day of the next session copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit in equity now pending in the circuit court of the city of Norfolk, in the State of Virginia, in which The National Exchange Bank of Baltimore, Maryland, is plaintiff and The Exchange National Bank of Norfolk, Virginia, through Wm. H. Peters, receiver, and others are defendants, and shall pay all such costs and damages as shall be awarded by said circuit court of the United States in case such court shall hold that this suit was wrongfully or improperly removed thereto, and shall do all such other acts as are required by law to be done on the removal of such suit from said State court to said United States court, then this obligation to be void; otherwise to remain in full force and virtue.

Dated this 16th day of April, 1890.

C. E. JENKINS. [SEAL.]
JOHN B. WHITEHEAD. [SEAL.]
JOHN B. JENKINS. [SEAL.]

STATE OF VIRGINIA, *City of Norfolk*, } *To wit:*

I, John B. Jenkins, of said city, being duly sworn, say that I am the surety on the foregoing bond; that I am a resident of the State of Virginia and the holder and owner of property therein; that I am worth the sum of two hundred and fifty dollars ($250) over and above all my just debts and liabilities, exclusive of property exempt from execution; that I have property in the State of Virginia liable to execution of the value of more than two hundred and fifty dollars.

JOHN B. JENKINS.

Subscribed and sworn to before me this 16th day of April, 1890.

LAW. L. WARING, *D. C.*

VIRGINIA:

In the Clerk's Office of the Circuit Court of the City of Norfolk, on the 28th Day of April, 1890.

I, Lawrence L. Waring, deputy clerk of said court, do hereby certify that the foregoing and annexed record in the case of The National Exchange Bank of Baltimore *vs.* R. H. McDonald *et al.* is a true transcript from the records of said court, embracing all process, pleadings, papers, and returns which appear in the said record at this date.

Given under my hand and the seal of said court the day and year first above written.

[SEAL.] LAW. L. WARING, *D. C.*

33 And on the same day, to wit, at rules held for the said court, in the clerk's office thereof, on Monday, the 5th day of May, 1890, came C. E. Jenkins, by his attorneys, one of the defendants in this cause, and files his demurrer to the bill in equity exhibited against him and others in the words and figures following, to wit:

34 Circuit Court of the United States, Eastern District of Virginia.

NATIONAL EXCHANGE BANK OF BALTIMORE, MARYLAND,
vs.
WM. H. PETERS, Receiver, *et al.*

Demurrer on Behalf of C. E. Jenkins, Defendant.

The following are the grounds of this demurrer:

1. The receiver alone can bring such a suit unless it is expressly charged that he has been requested to sue and has refused. This is plain under the general provisions of the national banking act. The liability of directors of national banks is governed by sec. 5239, U. S. Rev. Stats., which provides that for such acts as those named in the bill "every director who participated in or assented to the same shall be liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation."

If a director does any of these things he makes himself liable to the association whose agent or employé he primarily is, and the injury to the association becomes primarily an asset of the association. In case of its failure it passes to the receiver to be asserted by him and by the directors through him and through him alone. He represents the creditors and shareholders, and unless he is shown to be in collusion with the directors or negligent of the in-

35 terests of those whom he represents they have no remedy except through him.

Brinckerhoff *v.* Bostwick, 88 N. Y., 52.
Conway *v.* Halsey, 44 N. J. L., 462.
Bank. Mag. 1883 (Nov.), 378.

This is clear by construing sec. 5239 in conjunction with sec. 5234. The latter section provides that the receiver "shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it," &c.

Under this provision the U. S. Supreme Court has held that the receiver is the proper party to collect the assets of the association, and that he represents both the creditors and the association.

Kenndy *v.* Gibson, 8 Wall., at p. 506.
Bank *v.* Bank, 14 Wall., at p. 401.

Clear as this under the national banking act, it is yet plainer under the general principles of procedure in equity. It is merely a branch of the familiar doctrine of representation.

Movius *v.* Lee, 30 Fed. Rep., 300.
Smith *v.* Hurd, 12 Met., 371.
Thompson's Liability Directors, 249.
Greaves *v.* Gouge, 69 N. Y., 154.
Zinn *v.* Mendel, 9 W. Va., 580.
Brewer *v.* Boston Theatre, 104 Mass., 378.
Thompson Liability of Directors, 382, 385, 391.
Foss *v.* Harbottle, 2 Hare, 461.

2. No suit can be brought against the directors until judgment has been obtained against the association itself.

36 Thompson Liability of Directors, 462.
Water Works *v.* Dyeing Co., 4 Allen, 239.
Kinsley *v.* Rice, 10 Gray, 325.

3. No suit can be brought against the directors until there has been a formal proceeding by the Comptroller of the Currency to judicially establish the fact of the commission of acts of forfeiture and to forfeit the charter of the association.

This is evident from the language of sec. 5239 itself.

See also Johnson *v.* Churchwell, 1 Head, 146.
Thompson Liability Directors, 462.

4. The bill does not charge such acts on the part of the directors as would bring them under any liability at all. It nowhere charges that they had any knowledge that anything was wrong. It nowhere charges in the language of the statute that they "participated in or assented to" the violation of any law. It nowhere sets out any facts that would fix any liability on them. The use of general language, no matter how emphatic or unmeasured or regardless of the feelings of others that language may be, is not sufficient.

The facts which show a violation of law must be set forth. No such facts are set forth. The charges are of acts done by the officers of the bank paid to attend to it.

No charge is made against the directors of any unfair or improper dealings with the bank. If anything was done wrong, there is nothing to show that the directors were not victims instead of accomplices.

37 The decree of care required of the directors of a national bank has been the subject of one or two decisions. Those decisions establish that the directors are entitled to assume that the officers of a bank are honest and are properly conducting the affairs of the bank in the absence of anything to put them on inquiry, and that directors are not responsible if such assumption afterwards proves to be untrue.

Otherwise no one would be willing to act as directors who are unpaid.

See Movius *v.* Lee, 30 F. R., 298.
Clews *v.* Bardon, 36 F. R., at p. 620, '1.
Witters *v.* Sowles, 31 F. R., 1.
Arthur *v.* Griswold, 55 N. Y., 400.
Spering's Appeal, 71 Penn. St., 11.

Practically the only charges in the bill against Mr. Jenkins which condescends to come down to facts instead of using general language is based on one of the bank statements and points out many items in that statement claimed to be erroneous. No charge is made that he knew as a matter of fact that the statement was erroneous; but however that may be, this court has held in this very same case that under section 5209 and 5211 of the Revised Statutes the only duty of the directors was to "attest" those statements; that they were not required to verify them and were not criminally responsible for errors in them. If they were not criminally responsible, it is hard to see how they can be held civilly responsible.

38 If the bill means to charge that they themselves "made" those statements, it charges what under the law is evidently untrue, inasmuch as the law merely requires them to "attest" them, and therefore the statement amounts to nothing.

SHARP & HUGHES.

39 And on the same day, to wit, at rules held for the said court, in the clerk's office thereof, on Monday, the 5th day of May, 1890, came Richard H. McDonald, by his attorneys, and filed his separate demurrer to the bill in equity exhibited against him and others in the words and figures following, to wit:

40 In the Circuit Court of the United States for the Eastern District of Virginia.

THE NATIONAL EXCHANGE BANK OF BALTIMORE, Complainant,
vs.
R. H. McDONALD *et al.*, Defendants.

The separate demurrer of Richard H. McDonald to a bill of complaint exhibited against him and others by the National Exchange Bank of Baltimore in the circuit court of the city of Norfolk, but removed into the circuit court of the United States for the eastern district of Virginia.

The said defendant says that the said bill is not sufficient in law.

TUNSTALL & THOM, *p. d.*

I hereby certify that in my opinion the above demurrer is well founded in point of law.

ALFRED P. THOM, *Counsel.*

The affidavit of the defendant that this demurer is not interposed for delay is waived by agreement of counsel.

G. M. DILLARD, *p. q.*

41 And at another day, to wit, on the 9th day of May, 1890, came the plaintiff and defendants, by their counsel, and the following order transferring attachments was entered in the words and figures following, to wit:

42 In the Circuit Court of the United States for the Eastern District of Virginia.

THE NATIONAL EXCHANGE BANK OF BALTIMORE, Complainant,
vs.
WILLIAM H. PETERS, Receiver of the Exchange National Bank of Norfolk; John B. Whitehead, R. H. McDonald, C. E. Jenkins, Geo. M. Bain, Jr., R. T. K. Bain, James G. Bain, and O. Windsor, Defendants.

In this cause, which has been removed from the circuit court of the city of Norfolk into this court, it is ordered, by consent of the complainant and of the defendant Richard H. McDonald, given in open court by their respective counsel, that the property described in these proceedings as follows, to wit, that certain tract of land near Atlantic City, now included in the city of Norfolk, said to contain about fifty-six acres, bounded on the north by the road known as the Tanner's creek or Armistead's Bridge road, on the east by Colley's creek (sometimes called Washington creek), on the south by the land of F. M. Peed and by Colley's creek, and on the west by Colley avenue, which was conveyed to said McDonald by John B. Whitehead and wife, W. W. Old, trustee, and G. H. Boyd and wife, which conveyances are recorded in Norfolk county, which is a portion of the property on which the attachment in this cause has heretofore been levied, be, and the same hereby is, released and relieved therefrom, and that in lieu thereof the lien of said attachment be, and the same hereby is, by like consent, transferred to

43 that piece of real estate situated in the city of Norfolk and State of Virginia belonging to the said Richard H. McDonald and bounded and described as follows, to wit:

Bounded on the north by the right of way of the Norfolk terminal road, on the east by Colley avenue (sometimes known as the Fort or McMinn road), and on the south and west by the property of John H. Core, and that said attachment be as valid and binding as to said piece of property to which it is hereby transferred as aforesaid and be subject to the same defences as it was as to the property released therefrom, as set forth in this order.

It is further ordered that the complainant cause the fact of the release of said property from said attachment to be duly entered on the records of the proper Virginia State court.

Norfolk, 9th May, 1890.

RO. W. HIGHES, *Judge.*

44 And at another day, to wit, on the 21st day of May, 1900, again came the defendants, by their counsel, and filed the following as a supplement to the record from the circuit court of the city of Norfolk, Virginia, in the words and figures following, to wit:

45 The following copies are to be treated as a supplementary part of the record in the chancery suit of The National Exchange Bank of Baltimore, Maryland, *vs.* R. H. McDonald, pending in the circuit court of the city of Norfolk:

VIRGINIA:

In the Circuit Court of the City of Norfolk.

THE NATIONAL EXCHANGE BANK OF BALTIMORE, MARYLAND, Plaintiff,
vs.
THE EXCHANGE NATIONAL BANK OF NORFOLK, VIRGINIA, Through W. H. Peters, Its Receiver; John B. Whitehead, Orlando Windsor, R. H. McDonald, C. E. Jenkins, James G. Bain, R. T. K. Bain, and George M. Bian, Jr., Defendants. } In Equity.

To the Honorable C. W. Hill, judge of the said court:

Your petitioner, W. H. Peters, as receiver of the Exchange National Bank of Norfolk, Virginia, appearing specially for the purpose of filing the petition and not admitting that he is a necessary or proper party to the case, respectfully represents to this honorable court as follows:

1. That he is one of the defendants in the above-entitled suit.

2. That the matter in controversy in this case exceeds, exclusive of interest and costs, the sum of two thousand dollars.

3. That this cause is a suit in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arises under the Constitution or laws
46 of the United States, to wit, title 62 of the United States Revised Statutes, regulating national banks, all of which will appear from the bill filed in the cause.

4. This petitioner, having learned that some of the defendants, including all who have been served with process, have filed a petition for the removal of this cause into the U. S. circuit court for the eastern district of Virginia, hereby prays that this petition may be treated as a joinder by him in said petition and as a part of said petition, and your petitioner herewith offers a bond, with good and sufficient surety, for entering in the said circuit court, on the first day of its then next session, a copy of the record in the suit and for paying all costs that may be awarded against him by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto. Wherefore he prays the court that the said bond be accepted and approved; that this suit be removed for trial to the circuit court of the United States for the eastern district

of Virginia, and that no further proceedings be had herein in this cause.

WILLIAM H. PETERS,
Receiver of the Exchange National Bank of Norfolk.

The Bond.

Know all men by these presents that we, Wm. H. Peters, receiver of the Exchange National Bank of Norfolk, as principal, and C. E. Jenkins, as surety, are held and firmly bound unto the National Exchange Bank of Baltimore, Maryland, in the penal sum
47 of two hundred and fifty dollars; to the payment whereof, well and truly to be made, we bind ourselves, — heirs and representatives, jointly and severally, by these presents; yet upon these conditions: The said William H. Peters, receiver as aforesaid, having petitioned the circuit court of the city of Norfolk, Virginia, for the removal of a certain cause therein pending, wherein the said National Exchange Bank of Baltimore was plaintiff and the said Wm. H. Peters and others *are* defendants, to the circuit court of the United States for the eastern district of Virginia: Now, if the said William H. Peters, your petitioner, shall enter in the said circuit court of the United States, on the first day of its then next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed therefrom, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 16th day of May, A. D. 1890.

WILLIAM H. PETERS, [SEAL.]
Receiver of the Exchange National Bank of Norfolk.
C. E. JENKINS. [SEAL.]

In the Clerk's Office of the Circuit Court of the City of Norfolk.

C. E. Jenkins, the security in the above bond, made oath before me, deputy clerk of the said court, that his estate, after the payment of all his debts and of such liabilities as he may have incurred as security for others and after deducting all legal exemptions,
48 is worth the sum of $250, the penalty of the above bond, as witness my hand this 16th day of May, 1890.

JUNIUS A. COLEMAN,
Dep'y Clerk.

Order.

In the Circuit Court of the City of Norfolk, on the 20th Day of May, A. D. 1890.

NATIONAL EXCHANGE BANK OF BALTIMORE, Plaintiff,
vs.
WILLIAM H. PETERS, Receiver, &c., Defendants.

This cause came on to be heard this day upon the petitions of

William H. Peters, receiver; Chas. E. Jenkins, John B. Whitehead, and Richard H. McDonald to remove this cause to the circuit court of the United States for the eastern district of Virginia, and tendering bonds, with sufficient surety, conditioned as required by law, the other defendants not having been served with process; and it appearing to the court from said petitions that this case is removable, it is ordered that the said petitions and bonds be accepted and this court will proceed no further in the cause.

A copy.

Teste: LAW. L. WARING, *D. C.*

49 And at another day, to wit, on the 29th day of May, 1890, again came the plaintiff and defendants, by their counsel, and the court, after hearing the motion of the plaintiff to remand this cause to the circuit court of the city of Norfolk, Virginia, orders that the following decree be entered in the following words and figures, to wit:

50 Circuit Court of the United States, Eastern District of Virginia.

NATIONAL EXCHANGE BANK OF BALTIMORE, MD., *vs.* R. H. MCDONALD, JOHN B. WHITEHEAD, CHARLES E. JENKINS, and W. H. PETERS, Receiver of the Exchange National Bank of Norfolk. } In Chancery.

This cause came on to be heard this day on the motion of the plaintiff to remand the same to the circuit court for the city, which is the State court from which the same was removed, on the grounds assigned that there is no seperable controversy in the cause which can be removed; that the citizenship of the parties to the controversy is not such as to allow a removal of the same, and that there is no Federal question involved in the same, and was argued by counsel.

Whereupon the court, being of opinion, without passing on the other grounds, that there is a que tion arising under the Constitution and laws of the United States involved in the case, doth overrule the said motion.

Norfolk, 29th May, 1890.

RO. W. HUGHES, *Judge.*

51 And at another day, to wit, on the 25th day of October, 1890, the court, having maturely considered the questions of law arising in the foregoing proceedings mentioned, gives its opinion and decision in the words and figures following, to wit:

52 U. S. Circuit Court, Eastern District of Virginia.

NORFOLK, VA., *October 25th*, 1890.

NATIONAL EXCHANGE BANK OF BALTIMORE, MD.,
vs.
W. H. PETERS, Receiver; R. H. MCDONALD *et al.*, Directors.

Statement of the Case and Opinion by Hughes, J.

The complainant is one of the creditors of the late and now insolvent Exchange National Bank of Norfolk.

The bill is brought against the late directors of the insolvent bank, one of whom was president and another cashier, and against the present receiver of that bank. The complainant bank transacted with the Norfolk bank the business of collections, each for the other. In the fortnight preceding the closing of the doors of the insolvent institution, which occurred on the 2nd of April, 1885, a balance of $14,883 was in favor of the complainant against the Norfolk bank, less dividends, not exceeding 60 per cent., that have been paid by the receiver.

The bill, after setting out this claim, charges that the defendant directors "did not give that care, supervision, and attention to the affairs of the bank which the duties of their office and the nature of the trust reposed in them required, but, on the contrary, neglected the same and entrusted the entire business concerns of the bank to (its president and cashier), who recklessly and im-
53 providently loaned the money and securities of the bank to various embarrassed and insolvent firms and individuals without taking proper and sufficient securities for the protection of the creditors and others confiding in the directors' management of the bank, and recklessly converted the money of the bank to their use, the said president and cashier carrying a joint account at said bank which at the time of its failure was overdrawn in the enormous sum of over sixty thousand dollars."

The bill proceeds to set out a detailed series of "facts and circumstances" similar to the statement as to the president and cashier, relating to these officers and two other of the defendant directors, with a view of showing more specifically what it characterizes as the "gross negligence and mismanagement of the bank by its directors and officers." It charges that "it was the custom of the directors to meet only to organize and to declare dividends," and that the misappropriation of the funds and wrongful acts which it describes occurred during the management of the affairs of the bank by the directors who are defendants in this suit.

The bill prays for a discovery on oath from each of the defendants of all facts in their knowledge and which they may have heard and believe touching the mismanagement complained of, and that they shall severally answer generally and specifically the charges which it sets out.

It prays that the matters charged may be referred to a commissioner of the court to ascertain the truth of the statements

54 and charges which it makes and the liability of the defendants severally to make good the loss complained of, and to ascertain and report all other matters pertinent to this case which complainant has not had the means of obtaining. There is a prayer for general relief.

The epitome thus given of the bill shows sufficiently the character of this suit and suggests on its face the grounds of demurrer on which the case comes before the court; and the question presented is whether a creditor of an insolvent national bank of the United States can sue its directors for the purpose of fixing upon them a personal liability for the mismanagement of such an institution. It is not a question whether these directors are liable or not or may be sued or not and subjected to the liability, but only whether a creditor of a national bank can sue its directors for mismanagement and negligence of his own mere volition.

It is elementary law that if Jones injures Smith's person and Smith owes Brown a debt Brown cannot sue Jones for damages as a means of making good his debt against Smith. So if Jones buys a horse from Smith, Brown, Smith's creditor, cannot sue Jones, Smith's debtor, for the purchase-money. There is no privity between Jones and Brown either of contract or tort on which the action can rest. The universal rule, as old as the law itself, is that unless there be privity between plaintiff and defendant no action will lie; and in this respect equity follows the law, although equity, when once having cognizance of a cause between principal parties in privity, will then, when necessary to effect its policy of
55 doing complete justice, bring other persons incidentally connected with the subject of controversy before it, whether these latter are in privity or not.

The rule has no relaxation except where statute law intervenes to relieve a hardship which, in exceptional cases, would result from its enforcement and except where equity after a wrongful refusal to sue by the proper plaintiff then authorizes suit under its own direction.

A case in which the statute law intervened was that of Trustees *vs.* Boissieu *et al.*, 4 Hughes, 387, 3 Federal Reporter, 881, cited on brief for complainant. The case is known to the profession of Virginia as the Dollar Savings Bank case. That suit was brought by trustees in bankruptcy against the directors of a disgracefully insolvent bank by trustees whom the national bankruptcy act expressly authorized and directed to sue for assets of the bankrupt. That suit went to a decree from which there was no appeal, and the directors paid into the assets in bankruptcy the amount settled upon as proper in the case.

If the receiver of the late Exchange National Bank of Norfolk instead of a single creditor had brought the suit now under consideration, the question of demurrer would have been similar in its main feature, but not in all its features, to that which was decided on demurrer in the Dollar Savings Bank case, because under the national banking act the receiver of an insolvent national bank is

authorized and required, under the direction of the Comp-
56 troller of the Currency, to take possession of the assets of every description of the insolvent bank and to collect all debts, dues, and claims belonging to it. Section 5234.

In respect to directors of an insolvent national bank the national banking act provides that if they knowingly violate or knowingly permit any of its officers, agents, or servants to violate any provisions of law enacted to secure a proper administration of the affairs of such banks its charter may be forfeited on a decree by a proper court of the United States in a suit brought by the Comptroller of the Currency in his own name for that purpose. Section 5239.

It further provides that every director who shall have participated in or assented to the violation shall be liable in his personal and individual capacity for all damages which the association or its shareholders shall have sustained in consequence of such violation.

Thus the statute law makes directors of a national bank liable in damages for violations of their duty or negligence or malfeasance as directors and prescribes how they shall be subjected to liability. Being liable in damages, they are amenable to suit for damages in a jury proceeding, and not, I infer, to suit in any other form, whether at law or in equity. But even if they were amenable to liability in a proceeding not sounding in damages, then, the damages recoverable being an asset of the bank, the statute law empowers and requires the receiver of the injured bank, under the direction of the Comptroller, and him alone, to sue for the claim. Except the
57 receiver the statute law nowhere authorizes suit to be brought by any person not in privity against directors of national banks. The bill of complaint under consideration has, therefore, no sanction in respect to its party plaintiff from the statute law of the land.

Does it present a case in which equity in the exercise of a high prerogative, to which it feels at liberty sometimes to resort, will relieve against the rule of privity and entertain this suit though brought by a plaintiff otherwise incompetent to sue? Certainly the bill contains nothing on its face to require or to justify such a recourse.

Exceptional authority to sue is given only in the rare cases in which those legally competent to sue wrongfully refuse to do so. When such a case is presented, equity will sometimes authorize and direct suit to be brought by some other plaintiff whom it may approve.

As before said, whatever is claimed in the suit at bar would be an asset in the hands of the receiver if recovered, and the statute law imposes upon him the duty of sueing for it under the Comptroller's direction; but this bill contains no allegation either that complainant called upon the Comptroller to direct the receiver to sue and he refused or that the receiver himself was called upon and refused.

Containing no such allegation, the bill makes no case for a suit by a person other than the receiver; nor would it follow,
58 even if such an application had been made and refused and the fact had been duly alleged in the bill, that this suit

could be maintained, for in cases where directors of national banks have violated or negligently permitted the violation of the laws regulating those banks the statute law seems to require that the question of violation shall be judicially determined in a proper court of the United States in a suit instituted in his own name by the Comptroller for that specific purpose before the liability can attach to the directors, and therefore it would seem that directors cannot be pursued individually for such violation until after such an adjudication thus obtained. So that if the receiver and the Comptroller, though called upon to sue the defendants in this suit, had refused to do so, even the allegation of such application and refusal would have been insufficient ground of authority for bringing this suit.

I am of opinion that the provisions of the national banking act enter as part into the contracts of creditors with the national banks, and that those provisions which define the liability of directors and prescribe the proceedings to be taken against them when guilty of the violations of the act are exclusive of other liability and other proceedings, and that it is not within the prerogative of equity to authorize a disregard of the provisions of the national banking act defining such liability and prescribing such proceedings. In view of sections 5234 and 5239 of the act, I am of opinion, therefore, that this court cannot entertain the suit of a creditor against its directors of the late Exchange National
59 bank.

It is useless to maintain that the bill under consideration is a general creditors' bill, and as such may be entertained in accordance with the usual practice of equity in creditors' suits. A creditors' bill is one brought by creditors of an insolvent debtor against the debtor and such person as may have custody of his estate, having for its object an equitable distribution of its effects.

It is a suit between creditors and their debtor, between parties standing in the relation to each other of direct and complete privity. No statutory authorization or extraordinary stretch of the equity prerogative is required to validate such a proceeding. In this respect a creditors' bill is the antipodes of the one at bar. That rests on full privity between plaintiffs and defendant. This has no shadow of privity to stand upon.

But even if this were a bill resting on privity it would be a creditors' bill only in form. It was filed on the 31st March, 1890, whereas, on the 2nd April, three days afterwards, the fifth anniversary of the closing of the doors of the Exchange National Bank of Norfolk recurred, when the claims of all creditors who could come in and participate in the benefits of the bill became barred by limitation.

No petition was filed in the case by any creditor before the 2nd April, 1890, and of course none have been filed since.

60 So that, in fact, the bill is that of one creditor alone of an insolvent national bank brought gratuitously without previous application to Comptroller and receiver and a refusal on their part to sue.

The demurrer must be sustained and the bill must be dismissed.

61 And now, on this day, to wit, on the 18th day of November, 1890, came again the plaintiff and defendants, by their attorneys, and the court, after hearing the arguments of counsel, doth make its final decree in the words and figures following, to wit:

62 Circuit Court of the United States, Eastern District of Virginia.

NATIONAL EXCHANGE BANK OF BALTIMORE, MARYLAND,
vs.
R. H. MCDONALD *et al.* } In Equity.

This cause came on to be heard this day and was argued by counsel.

Whereupon the court, being of opinion, for reasons stated in writing and filed herewith as part hereof, that the demurrer of the defendant Charles E. Jenkins, filed at rules, and the demurrer of the defendant R. H. McDonald, filed at the May term of this court at the hearing by leave of court, are well taken, does sustain the said demurrers.

Whereupon the plaintiff moved to amend its bill as in paper "X" filed herewith as part hereof, which motion the court hereby overrules and refuses to allow such amendment to be made.

And the court does further decree that the attachment against the property of the defendant R. H. McDonald be, and the same is hereby, abated, and that the bill be, and the same is hereby, dismissed, and that the defendants do recover of the plaintiff their costs by them in this behalf expended.

Norfolk, Va., November 18, 1890.

RO. W. HUGHES, *Judge.*

63 And on the same day again came the plaintiff and prayed the court to allow it to file an amendment to its original bill, which the court refuses to do, the same being paper "X" referred to in the foregoing decree and in the words and figures following, to wit:

64 In the Circuit Court of the United States for the Eastern District of Virginia, *To wit:*

THE NATIONAL EXCHANGE BANK OF BALTIMORE
vs.
R. H. MCDONALD *et als.*, ex-Directors of the Late Exchange National Bank of Norfolk.

To the honorable judge of said court:

Your complainant, The National Exchange Bank of Baltimore, respectfully shows unto your honor, for amendment to the bill which it filed in this cause, in the circuit court for the city of Norfolk, Vir-

ginia, on the 31st day of March, in the year 1890, which cause was afterwards removed into this circuit court of the United States, and for the purpose of a fuller statement of that part of said bill which alleges that your complainant had waited in hope that its loss would be repaired by payments made by the receiver or in some other way, and that the statute of limitation was about to apply in bar of its remedy, and that it had no other remedy but through the means of this suit, your complainant alleges:

1st. That some weeks before instituting the suit counsel for the plaintiff bank applied to the counsel for the receiver of the Exchange National bank for assistance in bringing a suit against the defendants, and was informed by the receiver's counsel that his attention had been called by the receiver to the subject of such suits in the name of the receiver against the defendant directors, and that he had the matter under consideration.

65 That afterwards and the day before the institution of the suit, on the 31st day of March, 1890, the plaintiff's counsel again consulted the receiver's counsel to know if he would bring the suit in the name of the receiver, and was told by him, the receiver's counsel, that he had determined not to institute such a suit, and that the plaintiff must proceed independently.

2. Your complainant also alleges that after the failure of said bank, to wit, on the 25th day of April, in the year 1885, the charter of the said Exchange National bank expired and has not been renewed.

And your complainant prays that this amendment may be ingrafted into the said bill in the connection mentioned and may henceforth be regarded as a part of the bill.

And your complainant will ever pray, &c.

W. T. DIXON,
P't Nat'l Ex. Bank of Baltimore.

NEELY & DILLARD, *p. q.*

STATE OF MARYLAND, *City of Baltimore,* } *ss:*

Before me, the subscriber, a notary public in and for the city and State aforesaid, personally appeared Wm. T. Dixon, to me known as the president of the National Exchange Bank of Baltimore city, who, being duly affirmed according to law, affirms that the facts set forth in the foregoing petition are correct and true to the best of his knowledge and belief.

66 Affirmed and subscribed to before me this 7th day of November, A. D. 1890, as witness my hand and notarial seal.

WM. H. H. RALEIGH,
Notary Public.

[SEAL.]

67 THE NATIONAL EXCHANGE BANK OF BALTIMORE, MARYLAND,
against
W. H. PETERS, Receiver of the Exchange National Bank of Norfolk; R. H. McDonald, John B. Whitehead, C. E. Jenkins, R. T. K. Bain, George M. Bain, Jr. (James G. Bain and Orlando Winfsor).

To the honorable the Supreme Court of the United States:

The appeal of the above-named complainant and appellant respectfully showeth—

That on the 31st day of March, 1890, said complainant instituted its suit and filed its bill in the circuit court of the city of Norfolk, Virginia, which suit was afterwards, on the petitions of the defendants C. E. Jenkins, W. H. Peters, and R. H. McDonald removed into the circuit court of the United States for the eastern district of Virginia, wherein the proceedings were had and the acts done up to and including the final decree entered in the said circuit court of the United States on the 18th day of November, 1890, which appear from a complete copy of the record, which is herewith presented to substantiate this petition.

That the said complainant conceives itself aggrieved by the said final decree of the 18th of November, 1890, in the following particulars, to wit:

First. That said decree erroneously sustains the demurrers of C. E. Jenkins and R. H. McDonald.

Second. That said decree erroneously denied the amendment prayed for by the complainant, marked "X" in the record.

Third. That said decree erroneously dismissed both the complainant's attachment and bill.

And the complainant conceives itself further aggrieved, in this, that the opinion referred to in said decree as part thereof is erroneous in the following particulars, to wit:

68 First. In the position that the bill states no case for a suit by a person other than the receiver.

Second. In the position that it is necessary for the Comptroller to sue to establish the liability of directors before the receiver or stockholders or creditors in a proper case shall have any remedy.

Third. In the position that the liability imposed by United States statutes is exclusive of all other liability on the part of and proceedings against national bank directors.

In consequence of the foregoing errors in the said decree and opinion and the various other errors apparent therein this appellant doth hereby appeal from the whole of said decree of said circuit court of the United States, and respectfully prays that the decree of the said circuit court and a transcript of the record, proceedings, &c., in the cause, duly authenticated, may be sent to the Supreme Court of the United States without delay, and that the Supreme Court will proceed to hear the cause anew, and that the said decree of the circuit court and every part thereof may be reversed and a

decree made reinstating said suit or such other decree as to the Supreme Court shall seem just.

JOHN NEELY & MASON DILLARD,
Solicitors for Appellant.

Appeal granted as prayed in the foregoing petition, but not to operate as supersedeas; bond for costs in penalty — $500.

August 20th, 1891. JOHN M. HARLAN,
Justice Sup. C't U. S.

69 Know all men by these presents that we, the National Exchange Bank of Baltimore, as principal, and William T. Dixon, as sureties, are held and firmly bound unto W. H. Peters, receiver of the Exchange National Bank of Norfolk, Va.; R. H. McDonald, John B. Whitehead, C. E. Jenkins, R. T. K. Bain, and George M. Bain, Jr., in the full and just sum of five hundred dollars, to be paid to the said W. H. Peters, receiver; R. H. McDonald, John B. Whitehead, C. E. Jenkins, R. T. K. Bain, and George M. Bain, Jr., their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of August, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a circuit court of the United States for the eastern district of Virginia, November 18, 1890, in a suit depending in said court between The National Exchange Bank of Baltimore, complainant, and the above-named parties, defendants, a decree was rendered against the said National Exchange Bank of Baltimore; and the said complainant, The National Exchange Bank of Baltimore, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said W. H. Peters, receiver; R. H. McDonald, John B. Whitehead, C. E. Jenkins, R. T. K. Bain, and George M. Bain, Jr., citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said National Exchange Bank of Baltimore shall prosecute its appeal to effect and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

NATIONAL EXCHANGE BANK
OF BALTIMORE,
By W. T. DIXON, *Pt.* [SEAL.]
JOB SCOTT, *Cashier.* [SEAL.]
W. T. DIXON. [SEAL.]

Sealed and delivered in presence of—
FRANK R. DIGGS.
G. M. DILLARD.
R. V. LANSDALE, JR.

Approved by—
HUGH L. BOND, *Cr. Judge.*

70 UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. H. Peters, receiver of the Exchange National Bank of Norfolk, Virginia; R. H. McDonald, John B. Whitehead, C. E. Jenkins, R. T. K. Bain, and George M. Bain, Jr., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein The National Exchange Bank of Baltimore, Md., is plaintiff in error and you are defendants in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, asso. justice of the Supreme Court of the United States, this 22d day of August, in the year of our Lord one thousand eight hundred and ninety-one.

JOHN M. HARLAN,
Asso. Justice Supreme C't U. S.

71 On this 8th day of September, in the year of our Lord one thousand eight hundred and ninety-one, personally appeared Thos. H. Cross, special deputy marshal of U. S. for eastern district of Va., before me, the subscriber, H. S. Ackiss, commisioner of the circuit court of the United States for the eastern district of Virginia, and makes oath that he delivered a true copy of the within citation to John B. Whitehead, W. H. Peters, receiver; C. E. Jenkins, and George M. Bain, Jr., in person, and to R. B. Tunstall and A. P. Thom, composing the firm of Tunstall & Thom, counsel for R. H. McDonald, who is non-resident of Virginia.

Sworn to and subscribed the eighth day of September, A. D. 1891.

{Seal N. S. Ackiss, Commissioner Circuit Court U. S., Eastern District Va.}

H. S. ACKISS,
U. S. Circuit Court Commissioner,
Eastern District of Virginia.

72 UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. H. Peters, receiver of the Exchange National Bank of Norfolk, Virginia; R. H. McDonald, John B. Whitehead, C. E. Jenkins, R. T. K. Bain, and George M. Bain, Jr., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein The National Exchange Bank

of Baltimore, Md., is plaintiff in error and you are defendants in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, asso. justice of the Supreme Court of the United States, this 22d day of August, in the year of our Lord one thousand eight hundred and ninety-one.

JOHN M. HARLAN,
Asso. Justice Supreme Ct U. S.

73 It appears by the records in the circuit court of the U. S. for the eastern district of Virginia that R. T. K. Bain is confined in the Albany penetentiary, and, further, that he is not represented by counsel in the within cause in the court below.

[Seal United States Circuit Court, Eastern District of Virginia, Norfolk.]

M. F. PLEASANTS, *Clerk*,
By H. S. ACKISS,
Deputy Clerk.

[Endorsed:] R. T. K. Bain.

74 UNITED STATES OF AMERICA, *Eastern District of Virginia*, } *ss*:

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, do hereby certify that the annexed and foregoing is a true and faithful copy of the record and proceedings in a certain cause therein lately depending, wherein The National Exchange Bank of Baltimore, Maryland, is the plaintiff against W. H. Peters, receiver of the Exchange National Bank of Norfolk, Va.; R. H. McDonald, John B. Whitehead, C. E. Jenkins, R. T. K. Bain, and George M. Bain, Jr., defendants, now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court, at Norfolk, this the 8th day of September, in the year of our Lord 1891, and in the 116th year of the Independence of the United States.

[Seal United States Circuit Court, Eastern District of Virginia, Norfolk.]

M. F. PLEASANTS,
Clerk Circuit Court U. S., Eastern District of Virginia,
By H. S. ACKISS,
Deputy Clerk.

Endorsed on cover: Case No. 14,843. E. Virginia C. C. U. S. No. 1369. The National Exchange Bank of Baltimore, Maryland, appellant, *vs.* W. H. Peters, receiver of the Exchange National Bank of Norfolk, Virginia; R. H. McDonald, *et al.* Filed September 17, 1891.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

THE NATIONAL EXCHANGE BANK OF BALTIMORE, MARYLAND, APPELLANT,

vs.

W. H. PETERS, RECEIVER, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

TERM NO. 1369.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

To W. F. FRICK, ESQ., *Counsel for the Appellant.*

Take notice that the appellees, Richard H. McDonald and Charles E. Jenkins, will move the Supreme Court of the United States on Monday, the 4th day of April, A. D. 1892, to dismiss this appeal on the ground that the said Court has no jurisdiction of the same. Robt. M. Hughes For C. E. Je

CORPORATION OF THE CITY OF NORFOLK, TO-WIT: Alfd P. Nor

I, John B. Jenkins, a Notary Public for the Corporation aforesaid in the State of Virginia, do certify that Robert M. Hughes this day made affidavit before me that on Friday, the 11th day of March, A. D. 1892, he deposited in the post office at Norfolk, Virginia, with postage fully paid, a copy of the above motion and of the brief accompanying the same, directed to William F. Frick, Esq., Counsellor at law, care National Exchange Bank, Baltimore, Md., and that in due course of mail the said motion and brief should reach the said Wm. F. Frick on Saturday, the 12th day of March, A. D. 1892,

Given under my hand and notarial seal this 11th day of March, A. D. 1892.

John B. Jenkins

Notary Pu

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM A. D. 1891.

TERM No. 1369.

THE NATIONAL EXCHANGE BANK OF BALTIMORE, MARYLAND, APPELLANT,

vs.

W. H. PETERS, RECEIVER, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

The appellees, Richard H. McDonald and Charles E. Jenkins, move this Court to dismiss the appeal in this case on the ground that this Court has no jurisdiction to entertain and hear the same.

From the printed record in the case it will be seen that the case in its inception was a bill in chancery by the appellant, the complainant in the court below, and one of the creditors of the Exchange National Bank of Norfolk, of which the defendant, Wm. H. Peters, is receiver, against the directors of said Bank, to hold them responsible for negligence alleged to have been committed by them in its management.

This suit was first instituted in the Circuit Court for the City of Norfolk, a state court, by a precipe for summons, in accordance with the state practice, accompanied by an attachment. The bill also was filed in the state court. (Pp. 1-10 of Record.) The defendants, Richard H. McDonald, a citizen of California, John B. Whitehead, Charles E. Jenkins and William H. Peters, Receiver, citizens of Virginia, filed in the state court petitions to remove the case into the United States Circuit Court, on the ground of diverse citizenship, and also on the ground of subject matter, claiming that the construction of the National Banking Act was involved. In the state court the defendant, C. E. Jenkins, demurred to the bill on grounds immaterial to this motion, and the defendant, R. H. McDonald, demurred in the Federal Court.

The petitions to remove are on pp. 13, 15 and 21 of the Record. The grounds of the demurrer may be seen from the brief of counsel for C. E. Jenkins, defendant, on pp. 17-19 of the Record, which the clerk has oddly

enough inserted in the Record. After argument the demurrer was sustained and a decree entered dismissing the bill. This decree was dated November 18, 1890, and will be found on p. 28 of Record.

The act creating the new appellate courts went into effect on March 3, 1891, and the joint resolution which accompanied it fixed July 1, 1891, as the date after which appeals or writs of error should go to the new courts.

The appellant took no steps to appeal from the decree of November 18, 1890, until August 20, 1891. On that day it presented to his Honor, Mr. Justice Harlan, a petition for an appeal to this court, which was allowed, requiring a bond of $500. This bond was approved by his Honor, Judge Bond, the Circuit Judge. His Honor, Mr. Justice Harlan, also signed the citation, which was dated August 22, 1891, and which was served upon the appellees on September 8, 1891. These papers bearing on the allowance and maturing of the appeal will be found on pp. 30-33 of the Record.

The ground of this motion to dismiss is that the jurisdiction to entertain an appeal from this decree taken after July 1, 1891, is certainly not in this court. Whether it is in the new Circuit Court of Appeals is immaterial to this motion.

The portions of the Act of March 3, 1891, which bear upon this question are as follows: (26 Stats., 827-8)

"4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any District Court to the existing Circuit Courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing Circuit Courts, but all appeals by writ of error or otherwise from said District Courts shall only be subject to review in the Supreme Court of the United States or the Circuit Court of Appeals hereby established, as is hereinafter provided, and the review by appeal, by writ of error or otherwise from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Courts of Appeals hereby established according to the provisions of this act regulating the same.

5. That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

(1) In any case in which the jurisdistion of the Court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision.

(2) From the final sentences and decrees in prize cases.

(3) In cases of conviction of a capital or otherwise infamous crime.

(4) In any case that involves the construction or application of the Constitution of the United States.

(5) In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question.

(6) In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

* * * * * * * * *

6. That the Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the District Courts and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases."

Assuming for the moment that the case does not come within any of the classes named in sec 5 of the Appellate Courts Act, providing for appeals direct to this Court, the only question can be, whether cases pending in the lower Courts in which final decrees had been entered were effected by the passage of that Act. The action of the appellant in bringing an appeal to this Court after July 1, 1891, can only be explained by the supposition that it thought itself endowed with a vested right to an appeal, and that a subsequent statute could not affect it. But an appeal is not a vested right, and Congress may not only provide what cases may be taken up on appeal and where they may be taken, but may deny any appeal at all if it sees fit, subject of course to the provisions of the Constitution.

Francis Wright, 105 U. S., 381.

But the passage of the Act did not deprive the appellant of the right to a review by this Court of the decree of November 18, 1890. The joint resolution expressly provided that appeals or writs of error sued out or taken prior to July 1, 1891, should not be affected by it. Hence the appellant, at any time between March 3, 1891, the date of the Act, and July 1, 1891, could have taken an appeal to this Court, without the possibility of question. The only effect of the Act upon his right of appeal was to abridge to some extent the time within which it could be exercised. An abridgement of a limitation impairs no vested right, if a reasonable time is still left.

It can hardly be denied that writs of error sued out or appeals taken subsequent to July 1, 1891, must go to the new Court, if anywhere. The fact that in this special case the appellant by delay has impaired his right of appeal can not change the construction of the language of the joint resolution. That language is as follows: (26 Stats., 1115-6.)

"Nothing in said act shall be held or construed in anywise to impair the jurisdiction of the Supreme Court or any Circuit Court of the United States in any case now pending before it, or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said Courts before the first day of July, A. D. 1891."

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No. 1369.

THE NATIONAL EXCHANGE BANK OF BALTIMORE, MARYLAND, APPELLANT,

vs.

W. H. PETERS, RECEIVER OF THE EXCHANGE NATIONAL BANK OF NORFOLK, VIRGINIA; R. H. McDONALD, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

REPLY OF APPELLANT TO THE BRIEF OF APPELLEES ON THEIR MOTION TO DISMISS FOR WANT OF JURISDICTION.

Counsel for appellees, in their brief on motion to dismiss for want of jurisdiction, seem to have referred to all of the record in this case which, and to more of the Act of March 3d, 1891, creating Circuit Courts of Appeals, than, the Court will have to consider in properly disposing of this motion.

Pages 5 and 6 of their brief contain all of their argument which we suppose that it is necessary for us to consider.

Appellees' counsel are wholly responsible for the suggestions contained on the latter part of page 6 and all of page 7, and we simply say that we have not been "misled" as they suppose.

So we are prepared to admit that had the decree in this case, which was rendered on Nov. 18, 1890, been rendered after March 3d, 1891, this appeal would properly have been to the Circuit Court of Appeals, had the latter court been then organized.

This dispenses with much of appellees' brief contained on first part of page 5, and the preceding page.

When the final decree was rendered in this cause, November 18, 1890, the appellant was allowed by section 1008, Rev. Stat., the period of two years within which to appeal. Resting on that assurance, the appeal was not taken at once, for reasons which shall be later named.

Thus the apppellant was given the right to this appeal to the Supreme Court, by that section, on that day, and the right existed unimpaired till March 3d, 1891. This could not be denied, and is conceded by appellees' counsel.

But we make a broader claim than that, and we think the court will sustain us in it. We claim that, resting on the provision of section 1008, a person in position of the appellant might safely have gone abroad after November 18, 1890, with the assurance of the period of two years within which to return and take his appeal, and with no other risk than that Congress, in the mean time, might by some *positive* provision require the appeal to be taken in less time.

Has any such positive diminution of time been prescribed by Congress since November 18, 1890?

Appellees' counsel contend that it has in the "Joint Resolution to Provide for the Organization of the Circuit Courts of Appeals," passed March 3, 1891 (138 U. S., 715), which provides that nothing in the Act creating those courts "shall be held or construed in anywise to impair the jurisdiction of the Supreme Court or any Circuit Court of the United States in any case now pending before it, or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts before the first day of July, A. D. 1891."

But we are unable to find in the terms of that resolution any positive restriction or alteration of the appellant's right to appeal to the Supreme Court, from the decree of November 18, according to the provision of, and within the time prescribed by, section 1008.

The effect of that resolution seems to be to enlarge and enable. It enables cases arising after March 3, 1891, and before July 1, 1891, to be appealed directly to the Supreme Court, prior to the latter date; which cases, but for the resolution, could, under the Act of March 3, be taken only to the Circuit Courts of Appeals. We think this construction amply satisfies the language and intention of the resolution.

In this connection, appellees' counsel have "supposed" that we relied on what they call "a vested right to an appeal" and have "supposed" that we thought that "a subsequent statute could not affect it." We have just shown that such is not our claim, and the case which they refer to, Francis Wright, 105, U. S., decides nothing against the jurisdiction of the Court in the present case.

That case simply decides that as the Constitution gave the Supreme Court "appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make," the Act of February 16, 1875, limiting the juridsiction in admiralty cases to a review of questions of law was a constitutional Act, and that appellant had no right to appeal on questions of fact because Congress had been given the power and had not provided any such right. In our case Congress has, in sec. 1008, undeniably provided the right relied on, and supplied the very omission which lost the appellants their appeal in "Francis Wright."

As an authority for the construction which we place on the terms of the Joint Resolution referred to, we cite "The Protector," 9 Wall., 687. When that case was decided, five years was the time allowed for appeals. The decree appealed from was rendered on April 5, 1861.

The appeal was taken July 28, 1869. During a part of the time between those two dates the sessions of the lower court had been interrupted by the war. The Supreme Court had decided that a statute of limitations did not run during such time. The appellant sought to apply that principle in extension of the limitation on appeals.

The appellee moved to dismiss, denied the application of the above principle, and claimed that the right of appeal was further limited by the Act of Congress of March 2, 1867 (passed more than two years before the appeal was taken) which provided that from any decree of a U. S. Court, the sessions of which had been interrupted by the war, an appeal "*may be brought within one year from the passage of this act.*"

The report recites that "Mr. Phillips contended that this statute had prescribed, in a positive way, a limitation of one year from its enactment within which to bring up appeals situated as this one had been. The time given by the act was abundant, &c."

The decision says, page 690, "But it is urged that the act of March 2, 1867, has regulated this subject and has prescribed a limitation of one year from the passage of that act, within which to bring all appeals and writs of error which were suspended or interrupted by the rebellion. We are of opinion that this statute is an enabling, not a restrictive one; that it was not intended to take away any right of appeal, but to continue the right in cases where it had been lost. 'Where the common law and the statute differ,' says Blackstone, 'the common law gives place to the statute, and an old statute gives place to a new one * * * But this is to be understood only where the latter statute is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative.' Such repugnancy does not exist here."

And again "If Congress had intended to limit all appeals from Courts in insurrectionary States to one year from the passage of the law, it should have been so expressed in the act."

We cannot doubt that a similar construction will be applied by the Court to that portion of the Joint Resolution now under discussion.

On page 6 of their brief, appellees' counsel say: "It seems to be the idea of the appellant that because more than six months had elapsed on July 1, 1891, after the entry of the final decree in the case, which, under section 11 of the Act, cut off an appeal to the new Appellate Court, therefore this Court must have jurisdiction."

Neither appellant nor any of its counsel has entertained or expressed any such "idea," and we do not wish to have such weak views attributed to us as the appellees' counsel have done all through their brief, when our case admits of sound and strong reasoning.

When we were notified orally that this motion was to be made, we did

ask if counsel's attention had been directed to section 11 of the "Act to Establish Circuit Courts of Appeals, &c." (138 U. S., 713) which limits all appeals to that Court to the period of six months from the date of the decree appealed from. We supposed that the inference from our inquiry was obvious.

The Joint Resolution provides for the organization of the new Courts on the 3d Tuesday (16) of June, 1891, (138 U. S., 715), and they were accordingly first organized and came into actual existence on that day. But on the 19th day of the previous month (May), six months had already elapsed since the date of the decree from which we are appealing. So when the new Court was organized, the very terms of the Act creating it excluded us from appealing to it in this case.

Until June 16, 1891, no case could be appealed to the Circuit Courts of Appeals because, while they had been provided for, they had not been actually formed and were not in existence; and this was a sufficient reason for Congress to provide, which it did in the same resolution, that appeals in all cases might be as before to the Supreme Court till July 1, 1891—thus admitting cases arising after March 3, 1891, which by the terms of the Act of that date appeared to be excluded from direct appeal to the Supreme Court, so that no appellant in the new courts could say that part of his six months for appealing had elapsed while there was no court in existence to which he could appeal.

If there were occasion to strengthen it, this makes the construction which we contend for still more conclusive.

Jurisdiction in our case never attached in the Circuit Court of Appeals, and we never enjoyed the option to go there, and we cannot understand on what principle, or in what manner we can be denied our privilege of appeal as it originated under section 1008, directly to the Supreme Court.

Believing that section to prescribe the limit and the only limit to the time within which our appeal should be taken, we feel that it is useless to offer excuse for consuming little over one fourth of the time allowed us to take the appeal, but it is proper to mention that we only delayed at all taking it to get the benefit of the decision of the Supreme Court in Briggs, Recv., *v.* Spalding, et al, a decision which we wanted to guide us in this case, and that we took the appeal as soon as possible after getting the benefit of that decision.

In submitting this reply to the appellees' motion to dismiss, we sincerely trust that the court shall be impressed with the correctness of the views which we have herein expressed, and with the far-reaching importance of an adjudication of the questions involved in this suit, and with the fact that the court is being asked to deny the appellant the only opportunity which it has, or has had, of obtaining a review of a decision which denied it a trial and closed the doors of justice against its complaints.

Respectfully,

WILLIAM F. FRICK,
JOHN NEELY,
G. M. DILLARD,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM A. D. 1891.

TERM No. 1369.

THE NATIONAL EXCHANGE BANK OF BALTIMORE, MARYLAND, APPELLANT,

vs.

W. H. PETERS, RECEIVER, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

REPLY OF APPELLEES TO BRIEF OF APPELLANT, ON APPELLEES' MOTION TO DISMISS, FOR WANT OF JURISDICTION.

On behalf of the appellees, we respectfully submit that the argument contained in the brief of the appellant does not meet the point in the case. That brief discusses the question before the Court as if it turned upon the joint resolution to provide for the organization of the Circuit Courts of Appeals, passed March 3, 1891 (26 Stats., 1115-6), whereas it appears to us entirely plain that the prohibition upon the Supreme Court of the United States as to appeals is contained in the Act of March 3, 1891 (26 Stats., 827-8). Section IV. of that Act provides, " * * * " that the review, by appeal, by writ of error, or otherwise, from the ex- " isting Circuit Courts, shall be had *only* in the Supreme Court of the " United States, or in the Circuit Courts of Appeals, hereby established, " according to the provisions of this Act, regulating the same."

It must be admitted that the provisions of the Act in question do not include or permit an appeal in the case at bar, and the saving contained in the joint resolution does not apply to this case, for the reason that the appeal was not sued out or taken before the first day of July, A. D. 1891.

It seems to us, however, that this question has been finally settled by this Court, in the case of Wauton vs. De Wolf, 142 U. S., 135; and in pursuance of the law, as there announced, this appeal must be dismissed.

Respectfully submitted,

ROBERT M. HUGHES,
For C. E. Jenkins.

ALFRED P. THOM,
For R. H. McDonald.

FILED.
MAR 30 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 253.

ARTHUR W. WINDETT,
APPELLANT,

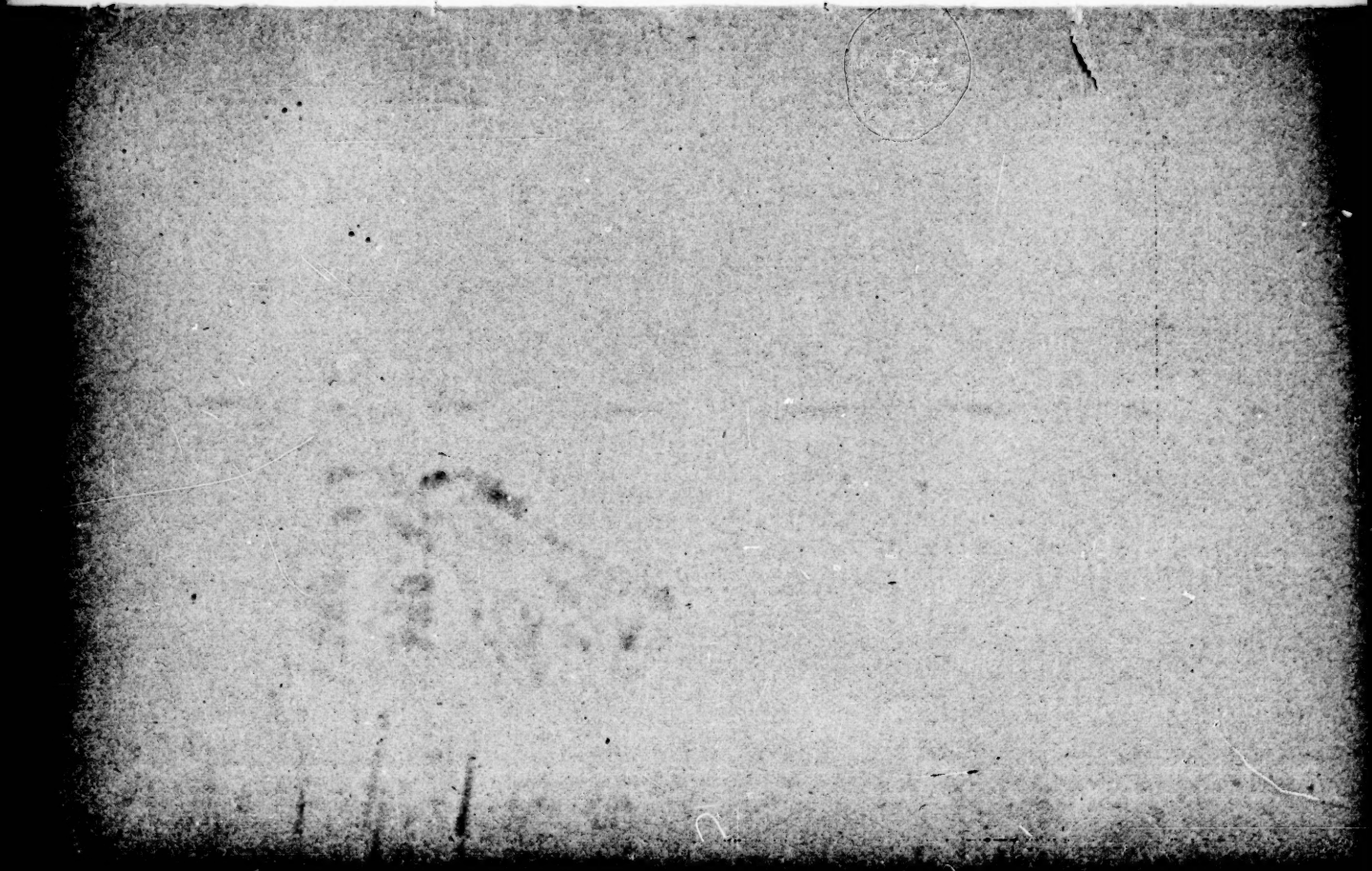
vs.

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE.

BRIEF FOR THE APPELLEE.

P. S. GROSSCUP.
J. H. DRUMMOND.
Counsel for Appellee.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.



Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 253.

ARTHUR W. WINDETT, APPELLANT,

vs.

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE.

Brief for Appellee.

I.—*Statement.*

The appellant, Arthur W. Windett, and his wife, Eliza D. Windett, on the 12th day of July, 1869, executed and delivered to Levi D. Boone, trustee, a trust deed upon the premises described in the decree of foreclosure to secure a loan of seven thousand five hundred dollars, evidenced by a note of that date for the same amount, maturing in five years, and bearing interest at the rate of eight (8) per cent. per annum, payable semi-annually. This loan was not discharged, and on the tenth day of February, A. D. 1882, the appellees filed their bill for the foreclosure of the trust deed.

The decree of foreclosure included a charge on account of outstanding tax titles.

It appears from the evidence that Windett defaulted in

his payment of taxes for the years '69, '71, '72, '74, '76, '77, '78, and '79, and also for the 6th, 7th, and 8th installments of assessments levied by the South Park commissioners. These defaults resulted in the issuance of a tax deed to Asahel Gage (Printed Rec., pp. 28–30 and 88–'9). These outstanding tax liens, and the danger they threatened against the security of the appellee, were the subject of several conversations between the appellants and John E. De Witt, president of the appellee. It appears that in these conversations Windett admitted the validity of the taxes and assessments, but denied the regularity of the proceedings leading up to the issuance of the deed to Gage, urging that certain notices required by the statute had not been served upon the tenants occupying the property (Printed Rec., pp. 35, 36). De Witt, on behalf of the company, offered to furnish the money to remove the liens, leaving entirely to Windett the power to obtain their release either by compromise, litigation, or payment, but urging speedy action in furtherance of the appellee's security (Printed Rec., p. 113). Two years then passed by. Windett had made no payments, no compromise, and had begun no litigation, either to remove the cloud or redeem from the tax deeds already issued; neither had he made payment of any interest upon the loans. And thus, simultaneously, the aggregate charges against the estate were piling up, and the outstanding tax liens were ripening. Thereupon, on the tenth (10th) day of August, A. D. 1881, under instructions from the appellee, D. G. Hamilton purchased these outstanding tax titles for three thousand seven hundred and fifty dollars (Printed Rec., pp. 28–30 and 88–'9), and the amount was charged up against the loan under the provision of the trust deed that the trustee might apply to the expenses of the trust all moneys advanced for taxes, insurance, or other liens and assessments, with interest thereon, at the rate of ten per cent. per annum, from the date of pay-

ment, all of which advances should be secured by the trust deed (Printed Rec., p. 101).

To the inclusion of this amount, with the interest thereon at the rate of ten per cent., the appellant filed a special exception with the master (Excep. 1, Printed Rec., p. 114).

The only other item in controversy is the disallowance of certain fees claimed by Windett.

It appears from the evidence that in 1878, a time when Windett had already defaulted on his loans and was not paying taxes, but before any bill for foreclosure had been filed, the appellee had a suit pending in Chicago to recover possession of some property, known as the Connolly or West Adams Street property, the full value of which was not to exceed four or five thousand dollars (Printed Rec., pp. 81–'2). The action brought by the appellees against Connolly was one of forcible detainer, and resulted in a judgment, *by default*, in favor of the former (Printed Rec., p. 37). A motion to reopen was overruled and an appeal taken. About the same time a bill in chancery was filed by Connolly to enjoin a writ under this judgment, to which a demurrer was filed, and the demurrer sustained in the circuit and appellate courts (Printed Rec., p. 38); thereupon another bill for the same purpose was filed and shared the same fate, and appeals were taken.

The appellees had also another suit to recover possession of what was known as the Wright or Carmichael property, the total value of the property being not to exceed ten thousand dollars ($10,000).

Mr. Windett was employed as attorney for the company in both these cases, and brought forward in the foreclosure suit, as a set-off against the amount due to the company, a claim for attorney's fees in these cases, and as a retainer in other cases, in which he does not claim to have performed any services, the amount of eleven thousand six hundred dollars.

To the refusal of the master to allow these claims for

their full amount he filed exceptions 2, 3, 4, and 5. (Printed Rec., p. 114.)

No other objections or exceptions to the findings or computations of the master were filed; and as these findings were adopted by the court in the decree of foreclosure, the exceptions above alluded to specify and measure the complaints to be inquired into here.

II.—*Points of Law and Fact.*

1. Windett, having taken no steps to pay, compromise, or redeem from the Gage tax title, or to indemnify the appellee against loss to its security arising therefrom, cannot now deny the rightfulness of appellee's purchase thereof, such purchase having been made two years after he was requested to remove the cloud, and it appearing that such purchase was made in the exercise of a reasonable judgment thereon.

Williams *vs.* Hilton, 35 Me., 547.
Bates *vs.* People, 42 O. St., 655.
Skilton *vs.* Roberts, 129 Mass., 309.
Sutherland on Damages, vol. II, p. 313–'14.
Washburn on Real Property, vol. III, p. 495–'6, 4th ed.
Kelsey *vs.* Remer, 43 Conn., 129.
Almy *vs.* Hunt, 48 Ill., 45.
Jones on Mortgages, vol. I, p. 358.
Wright *vs.* Langley, 36 Ill., 381.

2. There is no proof impeaching the validity of the taxes and assessments *as such*, or the tax sales. In the absence of such proof the validity of the taxes will be presumed. Besides, the tax deeds issued are *prima facie* evidence of the validity, both of the taxes and of the tax sales.

Now, the amount fixed by statute as necessary to redeem from such taxes, and assessments, and tax sales exceeded the

amount actually paid by the appellee and charged up, by several thousand dollars.

R. R. Co. *vs.* People, 116 Ill., 401.
Starr & Curtis' Annot. Stat., chap. 120, sec. 226.
Ransom *vs.* Henderson, 114 Ill., 532.
Gage *vs.* Busse, 102 Ill., 592.
Gage *vs.* Pirtle, 124 Ill., 502.
Testimony of D. G. Hamilton. (Printed Rec., pp. 29 and 88.)

3. The notices required by the statute to bar the right of redemption and validate the deed as conveying an absolute title were in fact served. The amounts, therefore, paid by the appellee for the tax deeds were absolutely essential to the protection of its security.

Testimony of Charles P. Westerfield. (Printed Rec., p. 87.)
Coleman *vs.* Shattuck, 17 Sickles, 348.

4. The amount of fees allowed Windett in the Connolly suit was sufficient.

5. The amount of Windett's fees in the Carmichael suit was fully settled. (Printed Rec., pp. 25 and 112.)

6. There was no general retainer of Windett by the appellee in any other than the Connolly and Carmichael suits, so called.

Testimony of John E. De Witt. (Printed Rec., pp. 111 *et seq.*)
Testimony of Robert B. Kendall. (Printed Rec., pp. 80 *et seq.*)

7. But there is no such thing in law as a contract *to* pay a retainer in cases in which no service has yet been rendered or called for.

Clendinen *vs.* Black, 2 Bailey (S. C.), 488.

III.—*Argument.*

1. *Windett, having taken no steps to pay, compromise, or redeem from the Gage tax titles, or to indemnify the appellee against loss to its security arising therefrom, cannot deny the rightfulness of appellee's purchase thereof, such purchase having been made two years after demand was made upon him to remove the cloud, and it appearing that such purchase was made in the exercise of a reasonable judgment thereon.*

The trust deed contains the following provisions (Printed Rec., p. 102):

"And the said Arthur W. Windett * * * covenants and agrees to and with the said party of the second part * * * that at the time of the sealing and delivering of these presents he is well seized of the said premises in fee simple; * * * that the same are free and clear of all liens and incumbrances whatsoever; that the said party of the first part will in due season pay all taxes and assessments on said premises and exhibit once a year receipts of the proper persons to said party of the second part showing payment thereof until the indebtedness aforesaid shall be fully paid."

Also a provision:

"That the trustee shall, out of the proceeds of any foreclosure sale, pay all the expenses of the trust, including all moneys advanced for taxes, insurance, or other liens and assessments, with interest thereon, at the rate of ten per cent. (10 %) per annum, from the date of payment; all which advances shall be secured by this trust." (Printed Rec., 101.)

Indeed, without any such provision in the mortgage the mortgagee would be entitled to charge up, in the foreclosure decree, whatever he had paid out to remove a tax lien. (*Wright* vs. *Langley*, 36th Illinois, 381.)

Jones on Mortgages, vol. 1, page 358, lays down the rule as follows:

"There is an apparent exception to the rule that the mortgage debt cannot, as against third persons, be increased after the execution of the mortgage, and that is, that money paid by the mortgagee to redeem the premises from tax sale or from any charge which is a paramount lien upon the property, becomes a part of the mortgage debt and may be enforced by foreclosure. The mortgage is usually so drawn that in terms it includes under the security any payments that have been made by the mortgagee in consequence of any default of the mortgagor. *But without any such provision, the payment by the mortgagee of charges which are a prior lien, and the removal of which is essential to his own protection and safety, gives him in equity, not only a right to retain the amount paid, out of the proceeds of the land when sold upon foreclosure, as against the mortgagor, but also the right of subrogation as to other creditors.*"

What, then, was the nature and condition of the tax lien or title with which the appellee was confronted?

The statutes of Illinois (Rev. Stat., Starr and Curtis, chap. 120) provide a proceeding for the collection of delinquent taxes upon real estate. This proceeding contemplates the bringing of the delinquent within the jurisdiction of the county court; a judgment against the premises; an offer for sale, including certain advertising; and the sale of the premises for the amount of the taxes. The statute then provides (chap. 120, sec. 212) a right on the part of the owner, or other person interested, to redeem from such sale as follows:

"Real property sold under the provisions of this act may be redeemed at any time before the expiration of two years from the date of sale by payment in legal money of the United States to the county clerk of the proper county the amount for which the same was sold and 25 per cent. thereon if redeemed at any time before the expiration of six months from the day of sale; if between six and twelve months, 50 per cent.; if between twelve and eighteen months, 75 per cent., and if between eighteen months and

two years, 100 per cent. on the amount for which the same was sold."

The statute thus provides a period within which, and the conditions upon which, redemption from such tax sales can be made. Until these conditions are complied with no redemption is permitted.

The statute then makes provision for a deed (sec. 218) as follows:

"Hereafter no purchaser, or assignee of such purchaser, of any land, town, or city lot, at any sale of lands or lots for taxes or special assessments, due either to the State or county, or incorporated town or city within the same, or at any sale for taxes or levies otherwise (authorized) by the laws of this State, shall be entitled to a deed for lands or lots so purchased until the following conditions have been complied with, to wit: Such purchaser or assignee shall serve or cause to be served a written or printed, or partly written or partly printed, notice of such purchase on every person in actual possession or occupancy of such land or lot; also the person in whose name the same was taxed or specially assessed if, upon diligent inquiry, he or she can be found in the county, also the owners of or parties interested in said land or lot if they can, upon diligent inquiry, be found in the county, at least three months before the expiration of the time of redemption on such sale, in which notice he shall state when he purchased the land or lot, in whose name taxed, the description of the land or lot he has purchased, for what year taxed or specially assessed, and when the time of redemption will expire."

It appears from the evidence (Printed Rec., pp. 28–30 and 88–'9) that in August, 1881, Asahel Gage held tax deeds against the property, for which D. G. Hamilton, acting for the appellee, on the tenth day of that month paid the sum of three thousand seven hundred and fifty dollars. Windett admits the *existence* of these tax titles, and the *validity* of the taxes upon which they were issued, for he says (Printed Rec., p. 36) that he did not regard the tax claims good *as tax titles,*

but intended to pay them, with fair interest, whenever the claimants would accept that amount. Nowhere was any claim made by Windett that the tax deeds had not, in fact, been issued and delivered to Gage, and no proof was introduced by him to impeach the validity of the taxes or the regularity or validity of the sales.

The whole point and scope of Windett's testimony against this purchase by the appellee was, that section 218, above quoted, relating to the issuance of a tax deed, had not been complied with by the service of written or printed notices upon the persons in actual possession or occupany of the land. To this point of fact he directed all his testimony, introducing in support thereof the testimony of Hugh Chittick, Timothy Reidy, Andrew Reidy, and Mary Carroll Reidy.

It must not be overlooked that appellee is not setting up these tax deeds as paramount title. It brings them into court merely as the cloud, upon the strength of which these payments were made. The occasion of the payment being there shown to have been tax titles, regular on their face, and threatening appellee's security, it devolves upon Windett to prove in what respect and for what reason they should not have been allowed. (R. R. *vs.* People, 116 Ill., 401.)

But Windett's proof, to wit, the want of service of notices upon the occupants of the land, goes only to the extent of showing that he could have redeemed from these tax sales, notwithstanding the tax deeds. The omission to serve such notices did not invalidate the taxes or the tax sales, but simply prevented the bar to redemption from taking effect. So far, if successful, Windett has only shown himself entitled to the rights of a person who can yet *redeem* under the statute.

Now, the question recurs whether, when there is an outstanding tax deed against the mortgaged property, the mortgagor in possession and, in fact, entitled to redeem, can insist upon remaining passive, neither paying the taxes nor at-

tacking the deed, nor indemnifying the mortgagee against losses thereunder, but forcing the mortgagee into the dilemma of either taking up the tax deed at his own risk of reimbursement, or allowing it to remain an outstanding menace against his title.

What was the situation of the appellee? It had seen spread upon the record, as an absolute title, paramount to its own, a tax deed regular in form and sweeping in effect. It was assured by the mortgagor, it is true, that this deed was invalid. The grounds of such invalidity were, however, not particularized, except in the alleged omission of service of notices upon the occupants of the premises. On the other hand, the existence of a tax deed implied that such notice had been served.

In this dilemma, what was the mortgagee to do? It is no part of his duty to keep off these tax liens. That duty devolves exclusively upon the mortgagor. Is he expected—compelled for his own safety—to look up the occupants of the lands and ascertain if notices were served? Suppose in this case the appellee had done this, what then? A little further investigation would also have brought forth the agent of the purchaser, Charles P. Westerfield, from whom at least equally positive assurance would have come that the notices were served (Printed Rec., p. 87). The occupants say they were not served; the agent says they were. Upon what better basis than a shrewd guess as to whom the court would believe can a mortgagee base his future conduct? If he believes one, he is likely to lose his advancement; if he believes the other, he is likely to lose his security, and between the two he is sure to lose something, *if* the law permits the mortgagor to stand by passively and laugh at his entanglement. This was the situation of the appellee for two whole years before the tax deed was taken up. (Printed Rec., p. 113.) That long period they gave to Windett to remove this menace, even at the risk of losing their own security. At its

expiration they removed the menace themselves by the purchase of the deed.

In making this purchase they acted, the evidence abundantly shows, in good faith and in the exercise of a reasonable judgment. Hamilton testifies that the amount of penalties included in the purchase-money was about $300. This would leave more than $3,400 as the amount of the actual taxes and simple interest thereon. But under the statute (chap. 120, sec. 212), quoted at length hereafter, Gage was entitled to 100 per cent. upon the amount actually advanced by him for the taxes. Now, if the tax deeds issued to Gage were invalid as tax titles, the appellant or appellee would be in no position to avail themselves of this defect except upon the payment of a sum of money equal to $3,400 increased by 100 per cent., or $6,800. It appears, therefore, that appellee made a good bargain, not only for itself but also for Windett, in the removal of these tax claims at an advance of but $300.

Windett was bound by the law, and by the covenants of his mortgage, to prevent taxes from becoming incumbrances upon the land. He is, therefore, under at least equal obligation to the mortgagee as is a covenanter to a purchaser under a deed covenanting against incumbrances. In the latter case it has invariably been held that the amount reasonably and fairly paid by the covenantee, for the removal of the incumbrance, is the measure of his damages against the covenanter. Sutherland in his work on Damages (vol. 2, p. 313) states the rule as follows:

"If the covenantee pays off or procures a discharge of the incumbrance, the amount that he fairly and necessarily pays for that purpose—not exceeding, however, the purchase-money and interest from the time of payment—will be the measure of damages."

Washburn in his work on Real Property (vol. 3, 4th ed., p. 495) states the rule as follows:

"If the incumbrance is of a kind which admits of being removed and the purchaser shall have extinguished it, he may recover upon his covenant what he may have fairly and reasonably paid for such extinguishment."

As illustrations of this rule we cite in our briefs the cases of *Kelsey* vs. *Remer*, 43 Conn., 129, and *Almy* vs. *Hunt*, 48 Ill., 45.

In the former of these cases the incumbrance was an attachment which had gone into judgment, but from which no execution had yet been issued or levied upon the premises. The covenantee contended that the danger of such levy was at least so imminent as to justify him in buying in the claim, especially so inasmuch as he had reported the menace repeatedly to the covenanter, and received from him no answer and no steps in the way of protection. Referring to this in its opinion, the court say (p. 138):

"It appears in the case that the plaintiff conducted himself with reasonable prudence and care in regard to the interests of the defendant in the matter; that he had abundant cause for believing and did believe that the land would be taken to satisfy the judgment that had been rendered in favor of the attaching creditor unless he paid and satisfied the same; and consequently, after he had made fruitless efforts to obtain instructions from the defendant in regard to the course which he desired him to pursue in the matter, he in good faith paid and satisfied the judgment, in order to free the land from the lien created by the attachment. In such circumstances we think the amount paid should be the measure of damages, no claim being made that it was greater than the value of the land attached. It was so held in the case of Norton *vs.* Babcock (2 Met., 510), in a similar case, and, we think, correctly."

In *Almy* vs. *Hunt* the alleged incumbrance was a tax lien against which the covenanter objected that the land was improperly listed and the taxes illegally levied by reason of the fact that the land had been misdescribed; but, admitting that this would be sufficient objection to set aside the tax deed

as a tax title, the court nevertheless held that the covenantee would be entitled to recover what he had paid, because such payment was in removal of an incumbrance which might ripen into a valid title.

In *Williams* vs. *Hilton*, 35 *Me.*, 547, the question was directly raised. The court below in that case included in the judgment, for the foreclosure of the mortgage, certain amounts paid out by the mortgagee to discharge tax liens. Against this feature of the judgment the mortgagor objected on the ground that the taxes were illegal, and that notice of such illegality had been served upon the mortgagee before payment. The Supreme Court, however, dismissed this objection and allowed the payment as a part of the judgment, and as its reason for doing so said :

"It was the duty of the mortgagor, and those holding under him, to discharge all taxes thus assessed upon the demanded premises, while they withheld the possession from the mortgagee, and in case taxes were assessed in a manner which they deemed illegal, notice of this fact should have been given to the mortgagee, and in case payment was to be resisted he should be indemnified against loss, because it would be unreasonable to subject the mortgagee to the hazard of contesting the legality of a tax title by a suit at law, in which, if the final result should be in favor of the validity of that title, all his rights under his mortgage would be forever lost."

To the same effect is Bates *vs.* People's, &c., 42 Oh. St., 655.

It must not be forgotten that Windett shows nothing which affects the validity of the taxes or the tax sales. His whole complaint goes to the validity of the deed, as a tax title. This mortgagee had, so far as this record discloses, no ground in the facts, and no information from Mr. Windett, that the taxes and the tax sales could not be enforced. It waited for two years for Windett to attack the deed as a cloud upon the title. We submit that it has extended to him all the op-

portunities, and more, that a fair comprehension of the situation required, and that its conduct, in view of Windett's refusal to proceed during these two years, was justified by the menace that hung over its security. Indeed any other view of the case would put all mortgagees in the power of the mortgagors, compelling them *at their own risk* to pay the taxes regularly listed on the duplicate, or entered in judgment, or gone as far as a tax deed, or else expose their security to the hazard that such taxes would effectually alienate the title. No such dilemma ought to occur out of a relation in which it is the duty of the mortgagors to keep the premises clear of tax encumbrances. If the claim invoked by Windett is to be sustained, it will be the first instance of a party lawfully acquiring an advantage through a violation of his own duty to the other.

2. *There is no proof impeaching the validity of the taxes and assessments as such, or the tax sales. In the absence of such proof the validity of the taxes will be presumed. Besides, the tax deeds issued are prima facie evidence of the validity both of the taxes and of the tax sales. Now the amount fixed by statute as necessary to redeem from such taxes and assessments and tax sales exceeds the amount actually paid by the appellee and charged up, by several thousand dollars.*

There is absolutely no proof in the record tending to impeach the validity of the taxes and assessments or the tax sales. In the absence of such proof the presumption of law is that such taxes and tax sales were regular and valid.

Railroad Company vs. *People*, 116 Ill., 401.

There is affirmative proof in the record, however, of a tax deed, and such a deed carries with it certain *prima facie* presumptions. Section 226 of chapter 120, Starr & Curtis' Revised Statutes, reads as follows:

"Deed executed by a county clerk as aforesaid shall be *prima facie* evidence in all controversies and suits in relation

of the right of the purchaser, his heirs and assigns, to the real estate thereby conveyed of the following facts:

"1st. That the real estate conveyed was subject to taxation at the time the same was assessed and had been listed and assessed in the time and manner required by law.

"2nd. That the taxes and special assessments were not paid at any time before sale.

"3rd. That the real estate conveyed had not been redeemed from sale at the date of the deed.

"4th. That the real estate was advertised for sale in the manner and for the length of time required by law.

"5th. That the real estate was sold for taxes or special assessments, as stated in the deed.

"6th. That the grantee in the deed was the purchaser or assignee of the purchaser.

"7th. That the sale was conducted in the manner required by law.

"And any judgment for the sale of real estate for delinquent taxes rendered after the passage of this act, except as otherwise provided in this section, shall estop all parties from raising any objections thereto or tax title based thereon which existed at or before the rendition of such judgment and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered."

The supreme court of Illinois (*Ransom* vs. *Henderson*, 114 Ill., 532), construing this section, held that since its passage the proof of such a deed makes a *prima facie* case of the validity of all the proceedings up to, and including, the sale.

Now, what would have been the rights of Windett as against Gage, even in case these tax deeds were not valid, as titles? It is plain that the taxes themselves were valid as well as the tax sales, and his only right would have been that of *redemption*.

The Statutes of Illinois (chap. 120, sec. 212) provide the amount payable for redemption as follows:

"Real property sold under the provisions of this act may be redeemed at any time before the expiration of two years

from the date of sale by payment in legal money of the United States, to the county clerk of the proper county, of the amount for which the same was sold, and twenty-five per cent. thereon if redeemed at any time before the expiration of six months from the day of sale; if between six and twelve months, fifty per cent; if between twelve and eighteen months, seventy-five per cent.; and if between eighteen months and two years, one hundred per cent. on the amount for which the same was sold. The person redeeming shall also pay the amount of all taxes and special assessments accruing after such sale, with ten per cent. interest thereon from the day of payment, unless such subsequent tax or special assessment has been paid by or on behalf of the person for whose benefit the redemption is made, and not by the purchaser at the tax sale or his assignee."

Gage vs. *Busse*, 102 Ill., 592, was a bill to redeem from a tax judgment and sale. It appeared that the judgment included, along with an authorized tax, a small amount of unauthorized tax. The complainant offered to repay the authorized tax, interest, and costs, but no penalty. The court held, however, that he could only redeem upon paying all that was coming under the preceding section, including penalty, less only the amount of the unauthorized tax.

Gage vs. *Pirtle*, 124 Ill., 504, disallowed penalties, because the *sale* was unlawful for want of proper notice. *Gage* vs. *Busse* was distinguished as being a proceeding "in the nature of an action to redeem," whereas *Gage* vs. *Pirtle* was to *set aside the sale.*

Now, Windett makes no attack on the sale. The success of his attack would leave him simply in a situation to redeem. His remedy, therefore, and its conditions would fall within the ruling of *Gage* vs. *Busse.* He would, in other words, be compelled to pay the penalties, as well as the tax, interest, and costs.

As the statute provides that tax deeds shall not be issued until after two years from the time of the tax sale, it will be presumed, in the absence of proof to the contrary, that the

tax sales, for which the Gage deeds were issued, occurred at least two years prior to such issue, and, *a fortiori*, more than two years before the purchase by Hamilton. The amount payable, therefore, to Gage, as a condition precedent to redemption, would be the amount of the taxes, increased by one hundred per cent.; but as the penalties paid by Hamilton were but three hundred dollars, the amount of taxes must have been about thirty-four hundred dollars, so that the *redemption* money would have amounted to sixty-eight hundred dollars.

What cause, then, has Windett to complain of the amount paid by the appellee? Should his claim have been established, and the tax deeds, as tax titles, thereby invalidated, he would have been remitted, simply, to his right of redemption, but subject also to the conditions of redemption. The exercise of this right, had Gage insisted upon the full penalties allowed to him by the law, would have cost the appellant more, by three thousand dollars, than the amount with which he is charged in the foreclosure decree.

3. *The notices required by the statute to bar the right of redemption, and validate the deeds as conveying an absolute title, were in fact served. The amounts, therefore, paid by the appellee for the tax deeds were absolutely essential to the protection of its security.*

Windett was not, during the time in dispute, an occupant of the premises. His own testimony, therefore, on the subject of service of notice is merely hearsay—that which he derived from the tenants in possession.

These tenants were Timothy, Andrew, and Jeremiah Reidy, and their mother, Mary C. Reidy, from January, 1875, to January, 1879. Two of these brothers, Timothy and Andrew, and their mother were called as witnesses, and testified in substance that no notice had been served upon them during that period. While very positive about this on ex-

amination-in-chief, the cross-examination developed that the brothers were away from home much of the time during the day; that they did not profess to know what occurred during their absence, at the house, and that their knowledge upon the subject testified to was, in short, that no notice had been served upon them *personally* during that period. The mother is equally positive in her examination-in-chief, but on cross-examination admits that she would not know what a tax notice was, being unable to either read or write, and that she has no knowledge but what such notice was served upon one of the sons while not in her presence.

The significant fact, however, relating to this period of time is that the third brother, Jeremiah, was not called at all, and that it was upon him that the notice, according to the testimony of Charles P. Westerfield (Printed Rec., p. 87), was served. Westerfield not only remembers this fact distinctly, but produces in evidence a copy of the notice served, and also a memorandum made contemporaneously, in a book kept by him for that purpose, in which the service of this notice is noted. It will be seen, therefore, that as between the Reidys and Westerfield the testimony is all one way, Westerfield testifying positively to the service of the notice upon Jerry Reidy, and that fact being wholly uncontradicted by Jerry Reidy or by his brothers or mother. This constitutes a sufficient notice under the statute.

Hugh Chittick was the tenant from 1869 to 1874, and merely testifies that he *did not remember* the service of any written or printed notice of tax sale during that period, but, he adds, "I do not know as I would have remembered if one had been served upon me, as I had considerable trouble those years. There might have been hundreds of them left there. I do not think I would remember them." He further testifies that he would not have reported such notice to his lessor, as he was away from home a great deal.

Of course, such testimony cannot establish the omission of the service of notices. Indeed, it does not appear that

the tax deeds lifted by Hamilton required the service of any notice during the period the property was occupied by Chittick.

It must not be forgotten that the law presumes that every step necessary to the legality of the deed has been complied with, and the burden of disproving such steps was, therefore, upon the appellant. As the court says in *Colman* vs. *Shattuck*, 17 *Sickles*, 348: "Every presumption is in favor of the fact that the statutory provision was complied with, and that the officer performed his duty." Also, on the same page: "The party assailing them (the tax deeds), therefore, is bound to establish by sufficient and satisfactory legal evidence the illegality or defect which vitiates or renders nugatory and void."

Against this legal presumption that the notices were served the appellant has brought the testimony of three occupants who do not remember their service, but failed to call the fourth, and the appellee has met this testimony by showing conclusively that the notice was in fact served at the house *where they all lived* by leaving a copy with the fourth occupant. There is no room for controversy in the face of such evidence. So far as the case at bar is concerned, at least, the validity of the tax deeds is not successfully attacked.

4. *The amount of fees allowed Windett in the Connolly suit was sufficient.*

The amount allowed to the appellant by the master and the court below as fees in what is known as the Connolly litigation, in addition to the eighty-five dollars previously paid, was five hundred dollars, making in all five hundred and eighty-five dollars. Was that so insufficient a compensation for the services rendered in that litigation as to justify the court in reversing this decree, and sending the case back for renewed proceedings?

Several years before the Connolly litigation began the ap-

pellee, as mortgagee of one McGovern, foreclosed a trust deed upon property including a house and lot on Adams street, Chicago. After the foreclosure was complete Connolly, who was in possession of this house, refused to quit, upon the pretense that he held from McGovern a lease executed before the mortgage and having yet a number of years to run. This lease was regarded by the appellee as a forgery, and Mr. Windett was employed to institute proceedings to eject him. (Kendall, Printed Rec., 80 *et seq.*, and De Witt, Printed Rec., p. 111 *et seq.*)

These proceedings took the form of a forcible-detainer suit instituted in the county court, Chicago, in December, 1878. In February, 1879, a judgment was obtained, by default, in favor of the appellee. Connolly allowed the time for appeal to pass by. Nothing remained, therefore, in the case except to serve the writ for possession. Connolly, however, a few days later made a motion in the county court for a new trial, which being overruled, an appeal was taken to the appellate court. A bill of exceptions was settled, and in February, 1880, the case was argued in the appellate court.

During the pendency of this appeal Connolly's attorney filed a bill in chancery for an injunction against the writ of possession and attacking the validity of the judgment. A demurrer to this bill was filed and sustained, as likewise to an amended bill, and the injunction was dissolved and the bill dismissed.

In May of the same year a second bill was filed, of the same kind, and an injunction obtained *ex parte* thereon was dissolved upon motion later. An appeal having been taken, these cases were argued also in the appellate court at the March term, 1880.

The above statement of what was done is extracted from the testimony of Mr. Windett and Mr. Burnham, a clerk in his office.

The character of this litigation—the learning and skill required to conduct it—is apparent to every trained lawyer

at once. The judgment was obtained by default; so that no fight was had over the pretended lease having been a forgery. That fact was by the default in a measure confessed. In fact the only testimony necessary to obtain a judgment upon such default would be to prove the service of notice required by the statute, and the fact that Connolly was in possession and refused to quit.

We have no means of knowing the exact nature and method of Connolly's attempt to open up this judgment, but we do know that it was by motion, and was probably upon affidavits setting forth the occasion of his having failed to file a plea.

This motion being overruled, the balance of the case was plain sailing. The supreme court of Illinois has held, in an unbroken line of decisions, that the setting aside of a judgment by default is a matter wholly within the discretion of the court and upon which error will not lie.

Harmison *vs.* Clark, 1 Scam., 131.
Wallace *vs.* Jerome, 1 Scam., 524.
Woodruff *vs.* Tyler, 10 Ill., 457.
Mitchell *vs.* City of Chicago, 40 Ill., 174.
Cox *vs.* Bracket, 41 Ill., 222.

Neither are we told the exact nature of the bill in chancery filed to open up this judgment; but plainly it did not make out a case of fraud, and could not in any other way make a case against the appellee, and was overruled upon demurrer.

A summary of the testimony also shows that the actual time spent by appellant in this litigation was as follows: Five half days in the county court and two days in the circuit court in one case, and three days in the other, making in all seven and one-half days (Printed Rec., p. 42 *et seq.*) Add to this the preparation of a brief setting up the cases just before cited and the argument in the appellate court,

and there could not have been over twelve or thirteen days' work.

In view of the fact that the case involved simply the possession of a house and lot not worth over five or six thousand dollars (Printed Rec., p. 80); that the time given to it could not have exceeded twelve or thirteen days; and that the litigation, opening by a default, proceeded subsequently upon questions of the simplest and plainest character, is not five hundred and eighty-five dollars a fair and reasonable fee for the attorney conducting it? Such a fee would absorb a whole year's rent, and more, of the property, the possession of which was the sole matter in controversy.

5. *The amount of Windett's fees in the Carmichael suit was fully settled and paid.*

The Carmichael suit, so called, was a litigation to get possession of what was known as the Timothy Wright property. A receipt attached to Mr. De Witt's deposition reads as follows:

No. 879.—Wright. CHICAGO, *Oct. 7th*, 1878.

Received from the Union Mutual Life Insurance Company one hundred dollars in full for services in getting possession of the Timothy Wright property.

ARTHUR W. WINDETT.

Mr. De Witt testifies in addition that the payment of this one hundred dollars was understood to be in full settlement of all the services in that case (Printed Rec., p. 112). There is no denial of this statement by the appellant, nor any attempt to question the receipt or go behind its recitals. It is apparent that Windett at the time accepted this one hundred dollars as a settlement, and this, of course, is conclusive as to that branch of the litigation.

6. *There was no general retainer of Windett by the appellee in any other than the Connolly and Carmichael suits, so called.*

The appellant in the court below asked for an allowance of five thousand dollars as a general retainer in certain cases of the appellee. The master and court below allowed one hundred dollars. Upon this claim, and its treatment, one of the exceptions is based.

The testimony of Windett in substance is, that some time in 1878 the president of the appellee informed him that he "wanted very much" to engage him professionally with reference to fifteen or twenty cases growing out of foreclosure proceedings; that Mr. Kendall, their regular attorney, was not able to attend to these cases, and that, knowing his professional character, the president wished to entrust that part of the appellee's interest to his management. Among these cases were the Connolly and Carmichael suits above referred to. Windett says further that he conferred with the president and officers of the company on several occasions afterwards, and made some special arrangements for the litigation spoken of, in the employment of a special agent to investigate the matters thoroughly, from which great good effect resulted in the Connolly case. It appears from his testimony that he, from this time on, held himself at the service of the company, but that without any warning a principal part of the business spoken of was diverted to some other lawyer, and no opportunity was, therefore, given to Windett to perform professional services for the company, except in the two cases already referred to.

We submit that on this testimony of Windett alone no contract upon the part of the appellee engaging Mr. Windett as their attorney in any particular cases, or for any particular time, is shown. The conversation was at most simply an expression of good will, or intention, upon the part of Mr. De Witt, such as frequently comes to the ears of lawyers without being followed by any maturer fruits. What the fifteen or twenty cases other than the Connolly and Carmichael cases were is not shown, and it does not appear that they were even spoken of in the most general way. There

is absolutely nothing disclosed in this conversation, as reported by the appellant, showing a legal and binding promise, or intention, upon the part of the appellee, to engage Windett as their counsel. The whole negotiation was simply the substance of things hoped for.

But even this indefinite and nebulous reference to a contract for a general retainer is dispelled by the testimony of Mr. De Witt (Printed Rec., p. 111) and Mr. Kendall (Printed Rec., p. 80), both of whom expressly state that Mr. Windett was retained in no cases, excepting the Connolly and Carmichael cases. From their testimony it appears that Mr. Kendall was somewhat crowded with business and asked permission of the president of the company to engage Mr. Windett in some minor matters. This selection of the appellant was probably due more to the fact that he was a debtor of the company, unable to meet his obligations, than to any confidence in, or admiration for, his legal qualifications. In the face of these two witnesses, either one of whom is at least as credible as the appellant, and neither of whom has any personal interest in this litigation, it would have been strange if the court below had allowed the extraordinary claim of the appellant. Indeed, as a matter of generosity, rather than of justice, the master made an allowance of one hundred dollars, and the appellant is doing well to obtain this much.

A good deal of light is thrown on this whole controversy concerning fees by Kendall's testimony (Printed Record, pp. 82–83), in which he states that the agreement with Mr. Windett, when the engagement was made, was that Windett was to receive one-fourth of his fee in cash, and the other three-fourths to be applied upon the note and mortgage. During the time that these services were being rendered, and in pursuance of this understanding, Windett was paid $35 and $50 respectively, as is shown by his receipts and Kendall's testimony (Printed Record, p. 106). Kendall says that his understanding was that these payments were made on account of the one-

fourth in cash which Windett was to receive in pursuance of the agreement. This testimony is nowhere disputed by Mr. Windett; so that, if it is true, Mr. Windett at that time consented that his services in the Connelly and Carmichael litigation were worth four times $85, or $380.

It is a significant fact that while Windett accepted this $85 under a contract whereby he was to receive one-fourth of his fees in cash, he made no request of the company for any further advancement from 1879 until he appeared before the master in October, 1883, in this foreclosure suit. Is it probable that one so poor that he cannot pay his taxes would make no request for cash payments due him through a period of more than four years, when such payments amounted, according to his present claim, to upwards of $2,500? Would a man remain so quiet, either about collecting the cash, or having the balance applied to his outstanding indebtedness, unless he had a bank account so fortunately plethoric that it made him negligent?

7. *But we contend that there is no such thing in law as an implied contract to pay a retainer in cases in which no service has yet been rendered or called for.*

Assuming Windett's narrative of the negotiations as true, and laying aside altogether Mr. De Witt's and Mr. Kendall's testimony relating thereto, it appears that the claim is based upon a so-called "obligation" to pay a retainer. Now, we insist that in Illinois, at least, there can be no such executory contract. A retainer, when once paid and fully understood to be simply as a retainer, may be recognized by the courts as one of the methods for professional compensation, but an obligation to pay a retainer, in cases where no service has been rendered ought never to be implied. Such an interpretation of the law would give to the profession a position that no other wage-workers occupy, and would put into the hands of grasping attorneys opportunities for

peculation that no vigilance could defeat. Lawyers, like mechanics or railroad presidents, ought to be fully paid for whatever services they perform, but there is no reason why the law should imply a contract in their favor for services simply talked about but never rendered.

Whatever the law in England on this subject may have been, in Illinois no respectable lawyer would insist upon such a claim. What are called retainers are frequently paid, but they are always credited to the client in the nature of an advance.

No case has been found in the books in which such an implied contract for a retainer has ever been enforced; indeed, no lawyer has ever before, so far as the reports disclose, appealed to the courts for aid in this behalf. The executors of a *dead* lawyer, on one occasion in South Carolina, made such an appeal, *Clendinen* vs. *Black*, 2 Bailey (S. C.), 488, but the supreme court of that State dismissed it as having no legal basis.

Much of the record in this case is taken up with the testimony of lawyers as to the value of appellant's services. None of the lawyers knew personally of the services, and all based their computations upon the truth of a hypothetical question submitted to them. An analysis of this question will show that it was entirely wide of the truth. We have, therefore, called no witnesses in rebuttal, nor have we any comments to submit thereon in this argument.

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